

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1352

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

JOHN H. WILSON, JR.,
Petitioner-Appellee,

v.

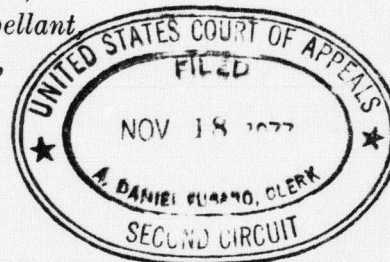
UNITED STATES OF AMERICA,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

APPENDIX

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Respondent-Appellant,
502 United States Courthouse,
Buffalo, New York 14202.

THEODORE J. BURNS,
Assistant United States Attorney,
of Counsel.



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PAGINATION AS IN ORIGINAL COPY



CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

D. C. Form No. 100 Rev.

[illegible]

DATE	PROCEEDINGS
1975	
July 30	Filed Indictment
July 30	J.S. 3 made
July 30	Govt. requests a warrant of arrest to issue for both defts. Motion granted.
July 31	Warrants issued for both defts.
Aug. 4	Filed Pet. & Ord. for Writ of H.C. Ad Proseq., for Deft. John Walker, for Arraig.; ret. 8/5/75
Aug. 1	Proceedings before the Magistrate - Deft. John Wilson, Jr. appeared in person and requested assignment of counsel. Adj. 8/5/75 for arraignment. Bail set at \$5,000 and deft. is remanded to the custody of the Marshal in default thereof.
Aug. 5	Proceedings before the Magistrate - Atty. Joel Daniels appeared with deft. John Wilson, who entered a plea of not guilty to the Indictment; Discovery motions to be filed by 8/11/75; Govt's response to be filed by 8/18/75; Argument of motions is scheduled 8/19/75; Bail continued at \$5,000. Deft. released on \$5,000 surety bond.
Aug. 6	Filed Cy. 5 of CJA-20 - Order appointing Joel Daniels, Esq., as counsel for the deft. John Wilson - Maxwell, Magistrate
Aug. 6	Filed \$5,000 3rd Party custody bond - Marilyn Wilson, surety, for deft.

Docket Entries.

DATE	PROCEEDINGS
Aug. 6	John Wilson
Aug. 6	Filed Warrant for Deft. John Wilson, executed 8/1/75
Aug. 6	Proceedings before the Magistrate - Deft. Walker appeared without an Atty. and requested assignment of counsel. Bail set at \$5,000; Deft. is presently an inmate at the Attica Correctional Facility. Atty. Leonard Berkowitz (assigned) appeared with Deft. Walker, for arraignment after being appt. by Magistrate Maxwell. Deft. Walker enters a plea of not guilty; Discovery motions are to be filed by 8/11/75; the Govt. is to respond by 8/15/75 and argue is scheduled for 8/19/75 at 10:30 a.m.; Bail continued at \$5,000.
Aug. 6	Filed Cy. 5 of CJA-20 - Order appointing Leonard Berkowitz, Esq., as counsel for the deft. John Walker, Jr. - Maxwell, Magistrate.
Aug. 7	Filed Warrant for Arrest of Deft. Walker - executed 8/6/75
Aug. 8	Filed Writ of H.C. Ad Proseq., executed - 8/6/75
Aug. 11	Filed Deft. Wilson's notice of motion for discovery, and etc., 8/19/75
Aug. 13	Magistrate Filed Deft. Walker's notice of Motion for discovery, etc., ret. 8/19/75
Aug. 15	Mag. Filed Government's response to certain pre-trial motions filed by the defendant John Wilson, Jr.
Aug. 15	Filed Government's response to certain pre-trial motions filed by the defendant John Walker, Jr.
Sept. 2	Atty. Berkowitz, Atty. for Deft. Walker requests a Wade Hearing. The Court requested Atty. Berkowitz to advise the Court by Sept. 5, 1975, if hearing necessary. If so the hearing will be scheduled for 2:00 P.M. on September 9, 1975, and case will proceed to trial on September 16, 1975.
Sept. 2	Filed Govt's suppl. response to motions for discovery
Sept. 4	Filed Pet. & Order for Writ of Habeas Corpus Ad Prosequendum--Curtin, for a hearing, ret. 9/8/75 - John Walker, Jr.
Sept. 12	Filed Petition & Order for Writ of Habeas Corpus Ad Prosequendum - for trial, 9/16/75- Maxwell, Mag.
Sept. 16	Filed writ of habeas corpus ad prosequendum for deft. Walker. executed 9-11-75
Sept. 16	Govt. moves case to trial before Judge Elfvin and Jury, at Buffalo, N.Y. Trial adj. to 9/17/75
Sept. 16	Hearing- The Court reserved decision on admissibility of identification
Sept. 18	Filed 1 subpoena D.T. for Edward F. Cumming, County of Erie Auto Bureau, served on 9-15-75
Sept. 17	Court advised counsel that identification/ in court will proceed as testified disclosed during the hearing was insufficient to prevent such testimony. Trial continues. Trial Adj. to 9-18-75.
Sept. 19	Filed subpoena - XXXXXXXXXX Neal Tolliver, ret. unexecuted.
Sept. 19	Filed subpoena D.T. - Department of motor vehicles, ret. no-service
Sept. 18	Trial continues with same appearances and jury - trial adj. to 9:00 on Sept. 19, 1975,;
Sept. 19	The court granted motion by deft. for mistrial, the Court directed case to jury on 9-23-75 and to possibly start the trial on 9-26-75.
Sept. 29	The court accepted a change of plea by Deft Wilson to guilty, and a change of plea by deft. Walker to guilty. Sentencing set for 10-20-75 for both defts. Bail continued as previously set for deft Wilson, Walker remanded to custody of state of New York At Attica Prison.
Sept. 24	Filed Ct. Stenographer's transcript of testimony of Witness Robert Paul Kilpatrick, in the trial of the above entitled action before Judge Elfvin, and a Jury, commencing on 9/16/75 at Buffalo, N.Y.
Sept. 24	Filed Ct. Stenographer's transcript of testimony of Witness Joseph E. I

Docket Entries.

U. S. v. John Walker, Jr. and John Wilson, Jr.

Sheet No. 2

CRIMINAL DOCKET

Cr-75-177

7-12796

DATE 1975	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
Sept. 24	taken in the trial before Judge Elfvin, and a Jury on Sept. 17-18 1975, at Buffalo, N.Y.		
Sept. 24	Filed Cy. 5 of CJA-21 - Authorization and Voucher for Transcript in the amt. of \$346.25; Orig. to the Adm. office for payment.		
Sept. 24	Filed Subpoena (D.T.) - John H. Wilson, Sr., served 9/22/75		
Sept. 25	Filed Ct. Stenographer's minutes of 9/23/75 - John Wilson, Jr.		
" 25	Filed Ct. Stenographer's minutes of 9/23/1975 - John Walker		
Sept. 26	Filed Subpoena - Robert Kilpatrick, served - 9/23/75		
Sept. 29	Filed Writ of H.C. Ad Proseq. - executed - 9/23/75		
Oct. 2	Filed Pet. & Order for Writ of Habeas Corpus Ad Prosequendum for sentencing - ret. 10/20/75 at 2:00 P.M. - Elfvin, J.		
Oct. 9	Sentencing for deft. Walker adj. 11/3/75; The Court advised Deft. Wilson that the Court was withdrawing the plea of guilty by deft. Wilson due to the statement in the Probation Report; The Court advised that the orig. plea of not guilty by deft. Wilson is being reinstated, bail continued.		
Oct. 22	Filed Ct. Steno's minutes of 10/20/75		
Oct. 24	Filed Writ of H.C. Ad Proseq., executed 10/20/75		
Oct. 31	Filed Pet. & Ord. for Writ of H.C. Ad Proseq. --ELFVIN, J.		
Nov. 3	Filed Ct. Steno's transcript of proceedings before Judge John T. Elfvin		
Nov. 3	Deft. Walker is sentenced as follows: Imposition of sentence deferred; defendant is placed on probation for five(5) years; if the five years of probation is satisfactory the court will not impose sentence; the probation period is to commence to run from the time of release from confinement by N.Y. State and to be concurrent with any parole by N.Y. State. ELFVIN, J.		
Nov. 3	J.S. 3 made		
Nov. 5	Filed Writ of H.C. Ad Proseq. - John Walker - executed 11/3/75		
Nov. 6	Filed Judgment and Order of Probation for Deft. Walker		
Nov. 11	Filed Ct. Stenographer's transcript of testimony of Joseph E. Burns, Kenneth Jonmaire and Edward F. Cummings, in the trial before Judge Elfvin, and Jury, commencing on 9/16/75		
Nov. 24	Court accepts change in plea to guilty - deft. John Wilson, Jr.; to be sentenced on 11/26/75		
Nov. 28	Filed Ct. Steno's minutes of 11/24/75		
Nov. 28	Filed Ct. Steno's minutes of 11/26/75		
Nov. 26	Deft. John Wilson appears for sentence, whereupon the Court sentences the defendant to the custody of the Atty. Gen. for a period of Five (5) Years, and Six (6) Years Special Parole Term, upon completion of sentence--ELFVIN, J.		
Nov. 26	J.S. 3 made for deft Wilson		
Dec. 1	Filed Judgment and Commitment for Deft. Wilson. Commitment issued.		
Dec. 2	Filed copy 2 CJA 20 voucher in the amt. of \$835.00 Orig to Adm. office for payment. Elfvin J.		

DATE		PROCEEDINGS	CLERK'S FEES	
1976			PLAINTIFF	DEFENDANT
Jan 6		Filed CJA 20 copy 2 in the amt. of \$955.00 original to Adm. office for payment. Elfvin, J.		
Feb. 12		Filed Deft John Wilson's application for reduction of sentence, with the Court's endorsement on application, denying deft's application for a modification of sentence—ELFVIN, J.		
Jan 30		Filed certified cy of J & C for Deft. Wilson, with Marshal's ret. of execution to the FCI, at Danbury, Connecticut on 1/22/76		
Aug. 24		Filed deft. Wilson's motion to obtain transcripts without payment of fees, with Judges endorsement granting same. ELFVIN, J.		
1977				
Mar. 29		Filed Deft. John Wilson's motion to vacate sentence (Civ-77-148)		
May 20		XX		

Docket Entries.

OFFENSE PD	JUDGE/MAGISTRATE Assigned	U.S.	vs	WILSON, JOHN, JR.	<i>Appeal</i>	Case Filed Mo. Day 8 3	Open: 7-30-77 Closed: 11-26-77
OFFENSE MO	0209 1 0936					No. of Defs * 1	
MEANS OF	Disp. Sentence			(LAST, FIRST, MIDDLE)			
FELONY	☒ District ☐ Office				JUVENILE		75 177 1 Yr. Docket No. Def.
U.S. TITLE/SECTION 21-841(a)(1)		OFFENSES CHARGED did knowingly, intentionally and unlawfully distribute a substance containing heroin, a Schedule I Controlled Substance			ORIGINAL COUNTS 1		U.S. MAG. CASE NO.
II. KEY DATES & INTERVALS		SUPERSEDING COUNTS			BAIL • RELEASE		
ARREST or U.S. Custody Began	INDICTMENT Information 8/3/77	ARRAIGNMENT 9/2/77	TRIAL Trial Set For 10/4/77		U.S. MAG. CASE NO.		
Summons Served	Indict. Waived	1st Plea	NG G NOL		BAIL • RELEASE		
First Appearance	In Charging District	Final Plea	NG G NOL		AMT. ☐ Fugitive Set ☐ Pers. Recog. PSA \$ 5,000 Date 9/2/77 ☒ 10% Deposit ☒ Surety Bond ☐ Bail Not Made ☐ Status Changed (See Docket) ☐ Collateral ☐ 3rd Cust ☐ Other		
						SENTENCE	
						Disposition of Charges ☐ Convicted ☐ On All Charges ☐ Acquitted ☐ On Lesser Offense(s) ☐ Dismissed ☐ WOP ☐ JWP ☐ On Government Motion	

MAGISTRATE		OUTCOME	
SEARCHED	ISSUED	INITIAL APPEARANCE DATE	☐ DISMISSED ☐ HELD FOR G OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR G OR OTHER PROCEEDING IN DISTRICT BELOW
RETURNED	RETURNED	PRELIMINARY EXAMINATION OR REMOVAL HEARING	
SERVED	SERVED	☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT	

Roger P. Williams

Joel Daniels

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE DELAY
8/3/77		Filed Memorandum and Order, dtd 8/2/77, that the sentence of John H. Wilson in CR. 75-177 is hereby set aside and vacated; and further ordered that, within 30 days of the filing of this order, petitioner John H. Wilson be brought before me to permit him to re-plead to the indictment in CR. 75-177.	(a) (b) (c) (d)
9/2/77		Filed \$5,000 surety bond.	
9/2/77		Court reassigns Atty. Joel Daniels to represent deft. John H. Wilson, Jr. Counsel advised the court that no plea agreement has been reached, the Court vacates sentence, deft. enters a plea of not guilty, court directs case be entered on calendar to set date for trial at 2:00 pm on 9/12/77. Ct. sets bail at \$5000 personal appearance bond and wife to sign as co-surety at request of Govt., Ct. permits wife to appear to sign as co-surety on 9/6/77 and deft. to be released after deft. signs the bond.	

IV. PROCEEDINGS (continued)		PAGE TWO		V. EXCLUDABLE DELAY			
DATE	DOCUMENT NO.	Interval Section 1 (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)	LE For Per abr U A	
9/6/77	Filed cy 5 of CJA-20 voucher appointing counsel; cy 4 to Admin. Ofc., ELFVIN, J.						
9/8/77	Filed Marshal's return of order: took custody of deft. at Allenwood Prison Camp, Montgomery, Pa. on Sept. 1, 1977 and on Sept. 1, 1977 delivered same to Erie Co. HC Bflg NY.						
9/12/77	Ct. set trial dt. of 10/4/77.						
9/19/77	Filed Govt's response to petition for writ of habeas corpus.						
9/21/77	Filed Ct. Steno's transcript of proceedings before Elfvin, J. on Sept. 2, 1977.						
9/27/77	Filed Govt's Notice of Appeal appealing fr the Order vacating and setting aside the sentence of deft. and permitting the petitioner to plead anew to the indictment, which order was entered in this action on 8/2/77.						
9/28/77	Notice of appeal, cy. of order, cy. of docket entries mailed to CCA.						

FINE AND RESTITUTION PAYMENTS				
RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

Indictment.

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

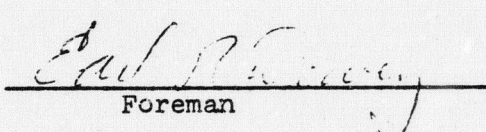
JOHN WALKER, JR. and
JOHN WILSON, JR.MARCH 1975 SESSION ~~TERM~~
(Impaneled May 27, 1975)No. *CE 75-177*Vio. T. 21, U.S.C.,
§ 841(a)(1)COUNT I

The Grand Jury charges:

On or about the 10th day of April, 1975, in the Western District of New York, the defendants, JOHN WALKER, JR. and JOHN WILSON, JR., did knowingly, intentionally and unlawfully distribute approximately 5.5 grams of a substance containing heroin, a Schedule I controlled substance as set forth in Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a)(1).

RICHARD J. ARCARA
United States Attorney

A TRUE BILL:


Foreman

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK



3
4 UNITED STATES OF AMERICA

5 -vs-

Cr. 75-177

6 JOHN WILSON, JR.,
7 Defendant.

8
9 Proceedings in the above entitled action before the
10 HON. JOHN T. ELFVIN, United States District Judge, in and
11 for the Western District of New York, at Buffalo, New York,
12 on September 23, 1975.

13 APPEARANCES:

14 RICHARD J. ARCARA, ESQ.,
15 United States Attorney, by
16 THEODORE J. BURNS, ESQ.,
17 Ass't. United States Attorney,
18 Appearing on behalf of the Government.

19 JOEL L. DANIELS, ESQ.,
20 Appearing on behalf of the Defendant.

21 ALSO PRESENT:

22 DANIEL McMORROW, Probation Officer.

23 * * * * *

Transcript of Proceedings, September 23, 1975.

1 MR. BURNS: Good morning, your Honor.

2 THE COURT: Mr. Burns, Mr. Daniels.

3 MR. DANIELS: Good morning, sir.

4 THE COURT: Criminal 75-177, United States
5 versus John Wilson, Jr.

6 MR. BURNS: It is my understanding, your Honor,
7 that at this time the defendant intends
8 to change his plea to the indictment in
9 the case.

10 THE COURT: All right. Mr. Daniels is that --

11 MR. DANIELS: Yes, your Honor, my client is in a
12 position today to withdraw his former plea
13 of not guilty to the indictment and enter
14 a plea of guilty.

15 THE COURT: All right. Mr. Daniels has been
16 assigned to represent you in this case,
17 Mr. Wilson, and that assignment was
18 made early in August, and from that time
19 you dealt with him, I know you have
20 been here in the courtroom with him
21 and he has spoken on your behalf. Has
22 he consulted with you from time to
23 time about the case and about the
24 proceedings today?

25 DEFENDANT: Yes, he has.

Transcript of Proceedings, September 23, 1975.

1 THE COURT: Have you been satisfied with his
2 representation of you as an attorney,
3 and are you so satisfied today to have
4 him represent you?

5 DEFENDANT: I think his representation is
6 excellent.

7 THE COURT: And you have no difficulty getting
8 your ideas across to him or understand-
9 ing what he has told you about differ-
10 ent aspects of the case?

11 DEFENDANT: No, sir, your Honor, I haven't.

12 THE COURT: Now, you understand that if you
13 do continue your plea of not guilty
14 that we would have to go into another
15 trial, such as we had partially the other
16 day, where the Government witnesses
17 would take the stand and confront you
18 and you would confront the witnesses,
19 and Mr. Daniels would be able to cross
20 examine them thoroughly on your behalf,
21 do you understand if you plead guilty
22 you are foregoing that?

23 DEFENDANT: Yes, sir.

24 THE COURT: If you continue to plead not guilty
25 we would be impaneling another jury,

Transcript of Proceedings, September 23, 1975.

1 we would be going through the trial
2 completely this time, I would hope, to
3 the point where the jury would deliberate
4 upon the case and listen to all of the
5 evidence, consider all of the evidence,
6 all of the documents, and compel the
7 Government to prove every element of
8 the criminal charge against you beyond
9 a reasonable doubt, do you understand
10 that is what would happen?

11 DEFENDANT: Yes.

12 THE COURT: By pleading guilty you are convict-
13 ing your self, rather than being con-
14 victed by a jury, do you understand
15 that?

16 DEFENDANT. Yes, sir.

17 THE COURT: The conviction is just as firm
18 and full from your plea of guilty as
19 it would be upon a conviction by a
20 jury, do you understand that?

21 DEFENDANT: Yes, sir, your Honor.

22 THE COURT: All right. Now, I want to place
23 the defendant on the stand under oath,
24 and pursuant to the amendment of Rule
25 11(e), which firmly states that

Transcript of Proceedings, September 23, 1975.

1 anything you say in these circumstances,
2 if I decide not to accept your plea of
3 guilty, nothing that you are saying can
4 be used against you on the trial of the
5 case. In other words, if I decide that
6 for some reason you ought not to be
7 permitted to plead guilty, and we had
8 the trial, whatever you say to us here
9 cannot be used at all, with the single
10 exception that if being under oath you
11 testified falsely in any material way
12 there could be a separate and later
13 prosecution of you for perjury, do you
14 understand that?

15 DEFENDANT:

Yes, sir.

16 THE COURT:

I don't know if Mr. Daniels talked
17 with you about that or not. If you
18 haven't, you may want to.

19 MR. DANIELS:

I was made aware of your method
20 of procedure on the plea by Mr. Walsh,
21 and I discussed that with my client,
22 and he is aware of that.

23 THE COURT:

Swear the witness.

Transcript of Proceedings, September 23, 1975.

1 J O H N H. W I L S O N , J R. , 205 Grider Street,
2 Buffalo, New York, called as a witness, and being first
3 duly sworn, testified as follows:

4 EXAMINATION BY THE COURT:

5 Q Mr. Wilson, if I do accept your plea of guilty, of
6 course, we would come to a time for sentencing, and
7 at that later time your attorney would have an oppor-
8 tunity to speak to me, arguing mitigation of your
9 circumstances in connection with what sentence I would
10 impose, and you would have an opportunity to do that
11 also. What we are talking about today though is
12 whether or not I'm satisfied from the facts involved
13 that you are guilty. Sentencing is a later thing.
14 Now, in that connection, you are charged in the
15 indictment with having on or about the 10th day of
16 April 1975, in the Western District of New York,
17 which includes the Buffalo area and the Lackawanna
18 area, that you, John Wilson, Jr., did knowingly and
19 intentionally and unlawfully distribute approximately
20 five point five grams of a substance containing heroin,
21 which is a controlled substance under the law of
22 Schedule 1, and this is in violation of Section 841(a)
23 (1) of Title 21, which is the section that makes that
24 a crime. Now, on or about April 10, 1975 what, if
25 anything, did you do in this connection?

Transcript of Proceedings, September 23, 1975.

- 1 A. April 10th, you want me to start --
- 2 Q. Yes.
- 3 A. -- from four o'clock? That is when I arrived, around
- 4 four o'clock. Usually every day I pick my wife up
- 5 from work, she works at the Marine Midland Bank, and
- 6 it takes us about a half hour to get from there to
- 7 Lackawanna. We were on the way out to Lackawanna and
- 8 stopped over to her mother's house, that is where the
- 9 children were, we had to pick them up, she baby sits
- 10 for us some days when I'm working or looking for a
- 11 job. On this day I dropped her off to get the children
- 12 ready, and walked up to the pool room.
- 13 Q. What pool room is this?
- 14 A. Fats Green's pool room, not Fat Dad's.
- 15 Q. Where is that?
- 16 A. Located on Ridge Road between Watson and Gates.
- 17 Q. In Lackawanna?
- 18 A. Yes, sir.
- 19 Q. And tell me what happened then?
- 20 A. I entered the pool room and walked around, spoke to
- 21 a few people, actually I asked a friend of mine did he
- 22 want to shoot pool. I was shooting a game of pool and
- 23 I was approached by a person named Neil Tolliver, whom
- 24 I'm not very familiar with, but he was asking me about,
- 25 you know, narcotics. He wanted to know did I know

Transcript of Proceedings, September 23, 1975.

1 anyone who had any. I told him that I didn't know
2 anyone specifically, that he should know more people than
3 I did, being that he was more involved than I was, and
4 that type of discussion, and I asked him had he tried
5 all the people he knew, and he said yes, he had tried
6 them and they didn't trust him, they won't do anything
7 with him.

8 Q. Then what happened?

9 A. Then he asked me to call a mutual friend of both of
10 ours and ask him was he in any shape to do that for
11 him, that he had cash money there. So I said, "Okay,
12 what's his number?" He gave me his phone number and
13 I went and called our mutual friend and asked him,
14 and he said, "Who is this for?" And I told him that
15 it was for Neil Tolliver, and he wanted to do this, and
16 he asked me, "Do you trust Neil?" I said, "Well, I
17 don't really know him that good. He has never done
18 anything to me." He said, "Well, okay."

19 Q. Go ahead, tell me what happened from that point.

20 A. I went back and -- the person, the mutual friend, said
21 that he should be -- he maybe will do it in about five
22 or ten minutes, something like that, and I said, "Okay,
23 let me know where you want to do it at." I went back
24 shooting pool. Now, we was shooting pool until around
25 a half hour or so, fifteen more minutes, and I received

Transcript of Proceedings, September 23, 1975.

1 a phone call at the pool room and at this time --
2 Neil had told me before while I was shooting pool --
3 Neil explained where he wanted the package delivered
4 once he could get it. I told him that he could get it.
5 I explained where he wanted it delivered. This all
6 took place in a matter of seconds, he was on the
7 outside of the phone booth, I was on the inside, talk-
8 ing to the individual on the phone. Neil stated that he
9 would like the package delivered to his girl friend's
10 house down Holbrook. So I told the individual that was
11 on the phone that he wanted this package delivered
12 down on Holbrook, somewhere near the corner of -- in
13 the vicinity of where his girl friend lived at, and
14 I hung up the phone. I told Neil this, and Neil brought
15 in this other fellow that -- I never seen him in my life,
16 as a matter of fact, I didn't speak to him. Neil
17 knew everything that was going to happen before it
18 happened, and he explained to the gentleman that --
19 I just found out his name was Kilpatrick -- at that
20 time he wanted to -- he had to get the money from
21 Kilpatrick, and I called in the other party, Walker,
22 and asked him -- explained the situation to him, and
23 asked him, "Would you take the money for this
24 package?" Walker agreed to it because -- his reason
25 why he agreed, after I explained to him that I didn't

Transcript of Proceedings, September 23, 1975.

1 trust the man so, you know, why would you expect him
2 to trust him -- the reason I asked him, he was about
3 to get sentenced. Anyway, we didn't think that this
4 would have any effect on him in case there were any
5 repercussions. So Walker took the money from him and --

6 Q. From who? From the other man?

7 A. From the other man. Now, this part of the transaction,
8 I didn't really want to be near that because I knew
9 what that would mean, as far as getting personally
10 involved.

11 Q. The other individual is someone that you have seen
12 since that time --

13 A. No.

14 Q. -- including here in the courtroom?

15 A. Oh, yes, I seen him here. I don't remember him at
16 all --

17 Q. All right.

18 A. -- Kilpatrick, I don't remember ever seeing him.

19 Q. All right. What happened after that? The money was
20 handed to Walker?

21 A. Yes, sir.

22 Q. And what happened after that?

23 A. There was a little confusion about the amount of money,
24 and after that confusion was straightened out, Neil
25 said to me, "Okay, I'll meet you down by my girl

Transcript of Proceedings, September 23, 1975.

1 friend's house."

2 Q. Do you remember the amount of money involved?

3 A. \$400.

4 Q. All right. Then what happened after that?

5 A. Neil and Mr. Kilpatrick left, and me and Johnny, we
6 left. We didn't know exactly where the package would
7 be in that vicinity, we knew that it should be some-
8 where down around that vicinity. Now, we drove down to
9 that vicinity and we blew our horn and told them to
10 come out to the car, and they came out to the car, and
11 the package was supposed to have been put somewhere
12 around there. I don't know how it got under that
13 agent's car myself.

14 Q. Did you see it was under the car?

15 A. No -- I seen that it was -- I knew what type of package
16 it was going to be in, wrapped up in a milk carton, and
17 I was looking for a milk carton. The milk carton
18 wasn't by a telephone pole or by the hydrant, it happen-
19 ed to be under -- by Kilpatrick's car, which I didn't
20 know was Kilpatrick's car at the time. Now, the mystery
21 is still a mystery to me, as far as who put it there,
22 between the two people that I talked to, Neil Tolliver
23 or the other party I spoke to, I don't know who put it
24 there and --

25 Q. Tolliver came out of the tavern, did he, when you

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1 honked the horn?

2 A. Right.

3 Q. And the other man?

4 A. Right.

5 Q. And they talked with you and Walker?

6 A. No, we wasn't about to stay around and talk because
7 we was expecting for police cars to pull up in all
8 directions.

9 Q. Well, how did Tolliver and the other man find the
10 drugs?

11 A. Well, after me and Walker looked around -- we knew it
12 was going to be in this container -- Walker happened
13 to see it before I did, I was on the passenger's side,
14 I was looking on this side, he was looking on the
15 other side. He just happened to see it before I did.

16 Q. Did either of you then point them out or say something
17 to Tolliver and the other man?

18 A. Yes. Yes, Walker pointed to the package where it was
19 at.

20 Q. All right. Then you took off?

21 A. Right, we took off before they even got it.

22 Q. All right. There is no question in your mind about
23 whether or not selling or having to do with heroin
24 is illegal?

25 A. No question whatsoever.

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1 THE COURT: All right. You can step down. You
2 have talked with Mr. Daniels about this
3 possible plea, I think you have already
4 indicated that, has he given you any
5 indication that I have made any promise
6 on your behalf or to him on your behalf
7 as to what I might do in sentencing?
8 DEFENDANT: No, sir, your Honor, he hasn't.
9 THE COURT: There has been no such promise. Has
10 he indicated at all whether there has
11 been any promise made by Mr. Burns or
12 anyone else in the United States
13 Attorney's office?
14 DEFENDANT: No promises, just recommendations.
15 THE COURT: All right. You understand that
16 there would be a certain recommendation
17 made by the United States Attorney's
18 office?
19 DEFENDANT: Yes, sir, your Honor.
20 THE COURT: What is that?
21 DEFENDANT: The recommendation being that -- if
22 it is accepted -- will state that I
23 would receive a term of no more than
24 five years.
25 THE COURT: You have been told that I do

Transcript of Proceedings, September 23, 1975.

1 receive recommendations from the United
2 States Attorney's office, have you also
3 been told that that is merely a recommend-
4 ation to me and that I don't bind myself
5 to follow that to any degree?

6 DEFENDANT: Yes, sir, your Honor, you have an
7 option to sentence me up to fifteen
8 years.

9 THE COURT: Mr. Burns, is it true that there has
10 been this promise of a recommendation?

11 MR. BURNS: Yes, your Honor, and that promise
12 is that the United States Attorney will
13 recommend to the Court that it not impose
14 any sentence in excess of five years
15 imprisonment.

16 THE COURT: All right. Well, I am satisfied as
17 to the factual basis of the plea. Now,
18 Mr. Wilson, what is your plea at this
19 time to the indictment?

20 DEFENDANT: Guilty.

21 THE COURT: I will accept that plea.

22 MR. BURNS: Perhaps we might state for the
23 record the maximum bounds. The maximum
24 penalty that could be imposed --

25 THE COURT: I think I indicated fifteen years.

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1 MR. BURNS: Fifteen years plus a fine of not to
2 exceed \$25,000, and also a mandatory
3 special parole term, if the Court should
4 see fit to impose a term of imprisonment.

5 THE COURT: That is right. There is in this
6 situation this tack-on of a mandatory
7 three year probationary period, regard-
8 less of what the imprisonment might be.
9 In other words, if I were to sentence
10 you to three years or six years, whatever
11 it would be, in addition to that there
12 would be a servitude of three years of
13 probation after the imprisonment, do
14 you understand that?

15 DEFENDANT: Yes, sir, your Honor.

16 THE COURT: All right. I accept the plea of
17 guilty. Now, Mr. McMorrow, what about
18 sentencing?

19 MR. McMORROW: We would like about four weeks.

20 THE COURT: All right. That would put it about
21 the 20th, would that be satisfactory,
22 of October?

23 MR. McMORROW: Yes.

24 THE COURT: Mr. Daniels?

25 MR. DANIELS: Yes.

Transcript of Proceedings, September 23, 1975.

1 THE COURT: We will set sentencing for two
2 o'clock on Monday, October 20, 1975.
3 Now, are you employed?
4 DEFENDANT: Yes, sir.
5 THE COURT: Where are you working?
6 DEFENDANT: I work at Joseph Tippio's.
7 THE COURT: What sort of an operation is that?
8 DEFENDANT: It's a gas station and car wash.
9 THE COURT: Where is that?
10 DEFENDANT: It's located on Niagara Street.
11 THE COURT: Do you work full time?
12 DEFENDANT: Yes, sir.
13 THE COURT: What is the present bail situation?
14 MR. BURNS: The defendant was previously released
15 on \$5000 bail, which was secured by the
16 signatures of some friends of Mr.
17 Wilson's.
18 THE COURT: What is the Government's disposition
19 now?
20 MR. BURNS: The Government recommends that it
21 continue.
22 THE COURT: All right, I will accept that. We
23 will continue that bail.
24 MR. BURNS: Thank you, your Honor.

* * * * *

H. T. NOEL
OFFICIAL REPORTER, U.S. DISTRICT COURT

I hereby certify that this record is
true and accurate transcript from the
stenographic notes in this proceeding.
Stanley J. Hall
Official Reporter
U.S. District Court

Transcript of Proceedings, October 20, 1975.

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK



3
4 UNITED STATES OF AMERICA

5 -vs-

Criminal 75-177

6 JOHN WILSON, JR.,

7 Defendant.

8
9 Proceedings in the above entitled action before
10 the HON. JOHN T. ELFVIN, United States District Judge, in
11 and for the Western District of New York, at Buffalo, New
12 York, on October 20, 1975.

13 APPEARANCES:

14 RICHARD J. ARCARA, ESQ.,
15 United States Attorney, by
16 THEODORE J. BURNS, ESQ.,
17 Ass't. United States Attorney,
18 Appearing on behalf of the Government

19 JOEL L. DANIELS, ESQ.,
20 Appearing on behalf of the Defendant.

21 * * * * *

Transcript of Proceedings, October 20, 1975.

1 THE COURT: Criminal 75-177, United States
2 versus Wilson, for sentencing. Mr.
3 Daniels, I know you have had an oppor-
4 tunity to examine the presentence
5 report. I don't know if you have done
6 that or not.

7 MR. DANIELS: This morning I did, your Honor.

8 THE COURT: All right. This is here on a plea
9 of guilty and, Mr. Wilson, you have an
10 opportunity to have your attorney speak
11 on your behalf, and then after that I
12 will give you an opportunity to say to
13 me anything you want to say. Mr.
14 Daniels?

15 MR. DANIELS: Thank you, your Honor. The Court
16 has a full probation report which, as
17 I indicated for the record, I have had
18 the opportunity to review. It is very
19 complete, and it reflects the entire
20 background of this defendant. His
21 prior record, naturally, speaks for
22 itself. I might add that he has no
23 prior drug related conviction that I'm
24 aware of. I think that is also reflected
25 in the record. Be that as it may, he

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1 has a number of arrests, most of which
2 are drug related. On the positive
3 side, he is a college graduate. He is
4 a man, I believe, of above average
5 intelligence. He seems to be the type
6 of a person, if he could get on the
7 right track, with a little guidance,
8 he might make something of himself.
9 He has a very nice family. I met his
10 wife through my representing the defend-
11 ant. She is a very nice person. She
12 is employed as a teller at the Lovejoy
13 Branch of the Manufacturers & Traders
14 Trust Company. He has two children.
15 I can't apologize or condone his
16 conduct, as far as this case is
17 concerned, but he doesn't seem to be
18 a substantial drug trafficker. This
19 was the type of case that is very
20 frequently tried in the court, an
21 entrapped-type sale involving a minimal
22 amount of drugs. As far as sentence
23 is concerned, naturally that is solely
24 within the discretion of the Court.
25 I would like to remind the Court of

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1 the recommendation made by the United
2 States Attorney at the time the plea
3 was entered. I leave the sentencing
4 to your Honor's discretion.

5 THE COURT: Mr. Wilson, is there anything you want
6 to say?

7 DEFENDANT: No, sir.

8 THE COURT: Now, one thing that bothers me
9 here, in the presentence report they
10 have a portion of Page 3, which supposedly
11 is your version of the offense, and it
12 says, "On or about April 10, 1975, at
13 Fat Green's pool room, I, John Wilson,
14 Jr., arrived there at 4:30 P.M. Upon
15 my arrival there a confidential informant
16 named Neil Tolliver approached the
17 pool table where I was involved in a
18 game of pool and he inquired about
19 Donald Walthall, and I told him that
20 I have not seen him at all. Then
21 Tolliver asked me if I knew where he
22 could obtain some heroin, and I told
23 him, 'You know more people than I do
24 involved in that type of dealing.'
25 Then Tolliver wanted me to call an

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"

1 individual who Tolliver assured me
2 would have some heroin, and I asked
3 Tolliver why he did not want to call
4 himself. Tolliver's reply was that he
5 owed the individual some money and did not
6 want the individual to know that he,
7 Tolliver, was buying heroin. Then
8 Tolliver supplied me with the person's
9 telephone number, and upon calling the
10 person, the person explained to me
11 that Neil Tolliver already had the
12 stuff and he wanted me to get the money
13 from Neil. I told him that I did not
14 trust Neil and I would let John Walker
15 get the money. I then spoke with Neil
16 and asked him what type of game he was
17 trying to play. Neil replied that he
18 did not want the person he was with to
19 know that he already had the heroin.
20 Neil then called his companion and
21 the stranger gave John Walker the \$400.
22 Neil then told Walker that the drugs
23 would be by the tire of the car he was
24 in and for us to come by and point it
25 out to the stranger. Neil said that

1 myself and Walker would get \$25 each
2 for doing that. The money I would
3 keep until later on so Tolliver could
4 get his cut. He and Walker pointed out
5 the package. Wilson dropped off Walker
6 at his house and before Wilson got back
7 to the pool room he was flagged down by
8 the person whom he had called on the
9 telephone and was told to give that
10 person the money and he in turn would
11 give Neil his cut." That is what I
12 have as a statement that you gave to
13 the probation office, and I assume that
14 when you gave that statement it was a
15 true statement?

16 DEFENDANT:

Yes, from my recollection of what
17 happened that day.

18 THE COURT:

Yes. It bothers me because it
19 borders so much, Mr. Wilson, on your
20 indicating that you, yourself, were
21 not guilty of distributing heroin, that
22 in reality it was Tolliver who was
23 doing it, and that this was known to
24 him and known to you at the time it
25 came about. Granted, there is enough

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1 in here of your own knowledge of what
2 was going on to have you be involved
3 in it, but at the same time, of course,
4 we have the circumstance that Neil
5 Tolliver at this time, as the Government
6 knew, was working on behalf of the
7 Government to set up this kind of a
8 deal, and if he, Tolliver, was the one
9 who had the drugs, and what you were
10 doing was sort of a cover for all of
11 this, namely, the \$400 which was coming
12 from the Government agent, Kilpatrick,
13 which was given to Walker, and was
14 really going for drugs which Tolliver
15 already had and Tolliver, himself, was
16 selling, if all of this were shown to
17 be true in a courtroom, there is no way
18 anyone can find you guilty. Neverthe-
19 less, you have pleaded guilty, and if
20 this be the truth of the matter, if this
21 be what really happened, I don't see
22 how I can allow you to continue pleading
23 guilty.

24 MR. DANIELS:

Your Honor, if I may, the problems
25 we have in these cases many times, as

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1 the Court is aware, is based on the
2 nature of the witness testifying, and
3 so forth, things that you would like to
4 prove, you have substantial difficulty
5 perhaps in proving, and as the attorney
6 I have to look at everything in the
7 picture.

8 THE COURT:

You have to evaluate what would
9 probably happen on the trial.

10 MR. DANIELS:

11 And it was my opinion -- I might
12 have been wrong, the jury might have
13 acquitted him -- it was my feeling at
14 the time that based on the recommendation
15 that was going to be made by the United
16 States Attorney at the time of sentencing
17 plus the fact that we have other pro-
18 blems across the street which I am in
19 the process right now of disposing of,
20 that this entire arrangement, the
21 plea of guilty here in this court, was
22 definitely in the best interest of my
client.

23 THE COURT:

24 Well, I don't argue with that, I
25 don't argue with that because I have
been involved with a sufficient number

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1 of narcotics cases to know that jurors
2 themselves sort of get all wound up and
3 involved in the word "heroin" or
4 "narcotics" to the point where they
5 sometimes don't really look objectively
6 on the evidence as paraded before them.
7 So there is obviously more of a tendency
8 on the part of a jury to find someone
9 guilty in a narcotics case than in a
10 bank robbery or embezzlement or a
11 Dyer Act case or anything else you want
12 to name.

13 MR. DANIELS:

14 For the record, there were other
15 problems, too. Mr. Burns wasn't going
16 to call that informant, and without the
17 informant being called and testifying
18 more or less along those lines, either
19 on direct or cross examination, we had
20 a problem. I didn't feel that even if
21 my client were inclined to testify in
22 the manner in which he stated to the
23 Court and his version on the probation
24 report, I still do not think that I
25 would have put him on the stand. I
feel, based on my experience, that the

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1 manner in which we disposed of the
2 case was in my client's best interest.
3 I might add that although not indicted
4 for Section 2, aiding and abetting,
5 after researching the law in the Circuit,
6 the Court would have charged aiding and
7 abetting.

8 MR. BURNS:

9 Might I be heard? Obviously the
10 version the defendant gives at this time
11 to the Court is not the version which
12 the Government would present to the
13 jury if there were a trial in the case.
14 As you know, hearing the evidence, the
15 version of Agent Kilpatrick was sub-
16 stantially different. However, I think
17 that under either theory of the case,
18 that is, the Government's through Agent
19 Kilpatrick or the defendant's through
20 his own testimony, there is still
21 evidence there that supports a finding
22 of guilt.

23 THE COURT:

Except for entrapment.

24 MR. BURNS:

25 That is if the defendant realizes
that the issue of entrapment is there
and recognizes that and looks at it to

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1 determine whether or not he wants to
2 raise that defense, I think that Mr.
3 Wilson's comments might require a
4 charge to the jury on entrapment, that
5 the issue of entrapment was in fact
6 there. Whether or not his testimony
7 would be sufficient to negate his plea
8 of guilty, I don't think it would, your
9 Honor, because, as Mr. Daniels points
10 out, under Section 2 of Title 18, the
11 person who aids or abets, counsels,
12 and so forth, may also be guilty of
13 an offense even if his -- Wilson's --
14 culpability is much less than Tolliver's
15 under Mr. Wilson's version of the event,
16 I think that there is still a basis
17 for a guilty plea, that is, that he
18 helped facilitate the sale, he was
19 ready and willing to participate, to
20 aid in the distribution. Propensity,
21 I think, is obvious because within a
22 matter of minutes of meeting Kilpatrick,
23 Mr. Wilson did, in fact, facilitate
24 the distribution.

25 MR. DANIELS:

Along the entrapment theory, your

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1 Honor, for us to be successful, number
2 one, I would probably have to put my
3 client on the stand, and there is a ques-
4 tion of the jury disbelieving him, and
5 I would have to have the informant
6 cooperating in some way on cross
7 examination or direct examination or as
8 a hostile witness. It was my impression
9 it wasn't forthcoming in this case.
10 I have tried numerous drug cases, and
11 entrapment is difficult to sell to a
12 jury. I was not particularly inclined
13 toward raising entrapment defense.

14 THE COURT:

As far as I can see, there hasn't
15 been any conviction, other than on this
16 plea of guilty --

17 MR. DANIELS:

That is right.

18 THE COURT:

-- of Mr. Wilson, of anything that is
19 drug oriented. Consequently, the
20 Government would be a little bit in
21 a bad way, as far as proving the pro-
22 pensity and the predisposition to
23 dealing, which would be a rebuttal
24 to the defense of entrapment. If in
25 fact it were Tolliver who had the

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1 heroin and it was really he who was
2 doing the selling, and only using Wilson
3 and Walker as a cover to this operation,
4 you can't tell what the jury would do,
5 but if the jury looked all that right
6 in the eyes and gave full credence to
7 the law, as I would have to instruct
8 them what the law is, whether Mr.
9 Wilson takes the stand or not, I assume
10 in this situation that he would have
11 to, he has to get something in on the
12 entrapment issue, the only way he can
13 do it is by taking the stand, I would
14 think, you know, that the jury well
15 could find the man not guilty. Certainly
16 what I have before me now is different
17 from what I had when you, Mr. Wilson,
18 took the witness stand here in court and
19 entered your plea of guilty. I asked
20 you about the whole transaction and
21 at that time this particular story
22 didn't come out, plus the fact that
23 when we had the trial, where we had
24 the mistrial, there always was the
25 great question of how the heroin got

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1 under the right front wheel of
2 Kilpatrick's automobile, and we theorized
3 as to how that might be. It was on that
4 basis that we took the one juror, Mrs.
5 Thexton, and decided because of her
6 own personal knowledge of the geography
7 of the area she could fill in to her
8 own satisfaction, and the satisfaction
9 of the other jurors, some possible way
10 that Mr. Wilson and Mr. Walker could
11 have planted it under the wheel of the
12 automobile, and maybe that geographical
13 opportunity existed or maybe it didn't,
14 the only one who knew it, because there
15 was no evidence, was Mrs. Thexton who
16 was raised in the area. If we accept
17 what Mr. Wilson says here, it is another
18 very good possibility, a very good
19 explanation of how the drugs got under
20 the front wheel of the automobile, if
21 in fact Tolliver had the heroin and,
22 as I remember the testimony, Mr.
23 Kilpatrick was the driver of the auto-
24 mobile, therefore Tolliver would
25 have been the passenger, and the drugs

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1 were found under the front wheel of the
2 passengers side of the automobile, and
3 there is only this ten minute interlude
4 after the automobile arrives there
5 before Mr. Wilson and Mr. Walker are
6 honking the horn outside of the pizzeria
7 and point out where it is. There are
8 still a lot of unanswered questions as
9 to how Wilson and Walker would know it
10 was under the front wheel, but certainly
11 that is an explanation as to how it got
12 there. Now, you have not seen Walker's
13 presentence report and I have --

14 MR. DANIELS:

Is there a conflict, your Honor?

15 THE COURT:

16 Well, this is the only place I get
17 this story. We know from the whole
18 circumstance that Mr. Walker came into
19 the thing rather peripherally, that
20 according to Kilpatrick and even accord-
21 ing to Mr. Wilson, it was Wilson who
22 came to Fats Green's pool hall and was
23 playing pool when Tolliver approached
24 you, Mr. Wilson, and this resulted in
25 the telephone call, and Walker was,
even according to your story, just

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1 brought in peripherally on the thing
2 and he was used as the payee of the money
3 and got the \$400, and that was it.

4 MR. DANIELS: I don't mean to interrupt --

5 THE COURT: Wilson really has a more intimate
6 knowledge of what was going on there
7 than Walker, and this would be one
8 reason why there isn't this explanation
9 in Mr. Walker's statement that I find in
10 Wilson's statement.

11 MR. DANIELS: Without divulging a confidence, your
12 Honor, does a reading of the Walker
13 statement and the probation report
14 satisfy you as far as how the drugs were
15 placed on the street?

16 THE COURT: If I were just sentencing Walker,
17 this problem wouldn't arise. It arises
18 out of this statement that Mr. Wilson
19 made.

20 MR. DANIELS: I didn't know about that statement
21 until I reviewed the probation report.

22 MR. BURNS: Until this time I hadn't heard that
23 Wilson had made the statement you read
24 in court. My comments are based upon
25 what went into my ear, and at this time,

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1 without giving --

2 THE COURT:

3 Everyone knows that the problem of
4 catching up with people who are dealing
5 in narcotics is a tough job, and not a
6 pleasant job for anyone involved in
7 doing it. They've got to do a lot of hard
8 nose dirty surveillances and dealing in
9 carrying it out, but the one thing that
10 struck me in the trial itself was that
11 here we have two agents sitting immed-
12 iately across the street in the front
13 window, who are alerted to the time when
14 they ought to be really paying attention
15 when the Kilpatrick automobile arrives
16 on the scene, and within ten minutes
17 after that Mr. Wilson and Walker are
18 coming south on Ingham and honking
19 their horn, and stopping at a stop sign
20 or not stopping at a stop sign, whatever
21 all that push and pull came out to.
22 Anyway, here is ten minutes of concen-
23 trated time of these people in the front
24 window and they have no idea how a package
25 got under the front wheel of the auto-
mobile.

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1 MR. BURNS:

2 Your Honor, if the case were going
3 to the jury, my argument would be as
4 follows, and it is the same to you. Yes,
5 they were conducting the surveillance.
6 Yes, they had been alerted. Also they
7 had been in this tavern for a few hours
8 waiting. They didn't know exactly when
9 any events were going to take place.
10 They were trying to be as inconspicuous
11 as possible. They can't put their chairs
12 down and start staring out of the window
every minute of the time.

13 THE COURT:

14 This is the perfect answer to why
15 they don't have binoculars or why they
16 don't have cameras. To do so would turn
the spotlight on them.

17 MR. BURNS:

18 They tried to shoot pool to divert
19 attention from their real purpose, which
20 was to watch across the street. If
21 you recall the angle, if you are playing
22 pool you are going to have to turn your
23 head to the right and look behind you in
24 order to see what was going on. That
25 would be my argument to the jury, and
I think it is a plausible one.

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1 MR. DANIELS: If you charge aiding and abetting the
2 punishment is the same, what is the
3 difference?
4 THE COURT: Entrapment is just as much a defense
5 to that.
6 MR. DANIELS: I'm aware of that. From my point
7 of view also, if the informant testified
8 to contradict the statement made by the
9 defendant on the probation report, I
10 think entrapment would be pretty tough
11 to sell.
12 THE COURT: Certainly if Mr. Wilson took the
13 stand and said to the jury what he said
14 here, and the informant didn't come
15 forward, I would think there would be
16 ample justification for the jury trusting
17 Mr. Wilson's statement.
18 MR. DANIELS: I had a similar case like that once
19 and we lost. It went to the jury on the
20 entrapment. Maybe we lost because of
21 my inability or competence perhaps --
22 THE COURT: I doubt that. You are a very capable
23 attorney.
24 MR. DANIELS: -- to present it properly to the jury,
25 but I have to call the shots as I

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1 see them, Judge, and with my client's
2 background and being at that pool hall
3 and everything, I don't like to put him
4 on the stand if I can help it, if I
5 can go to the jury on some other theory
6 I am more inclined to do it. It was
7 my opinion that unless the informant
8 is going to corroborate him where I can
9 argue better to the Court on the issue
10 of entrapment as a matter of law, it is
11 a problem because if you go in on the
12 entrapment you are admitting the crime.
13 The United States Attorney says, 'Look,
14 he admits the crime, what else are you
15 worried about?' It is a sophisticated
16 argument and it is -- for an average
17 jury -- difficult to sell.

18 THE COURT:

19 I'm not arguing with you too much
20 as to what juries tend to do in narcotics
21 cases, because I know, from the prosecut-
22 or's point of view, it is easier to get
23 a conviction in a narcotics case. The
24 jurors are immersed in the whole thing,
25 it is an odd milieu for them. Like in
a civil case, if you are talking about

1 electricity or anything electrical,
2 all the time there is fault. In narcotics
3 it is easy to get a conviction whether
4 you are talking entrapment or whether
5 you are talking about some dearth of
6 the whole evidence, the jury still tends
7 to go for a conviction, and I know that.
8 But we have two things. You have, of
9 course, my own situation in the trial,
10 where if the total evidence were such
11 that I did not feel the jury could
12 possibly return a conviction, of course,
13 I can get into the situation, and if
14 I don't go along with that, even though
15 this is a hard road to travel again,
16 there is always the appeal process.
17 You don't like to think of taking appeals
18 but that is what the appellate courts are
19 there for. Maybe they would decide
20 there wasn't sufficient evidence or that
21 I had made a mistake in not doing such
22 and so in the case, and they would take
23 care of it.

24 H.R. DANIELS:

25 Reversals on entrapment are pretty
difficult from my reading of the cases,

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1 if the charge is adequate, and the
2 United States Supreme Court had a recent
3 say in some of these entrapment cases.
4 When you try to argue entrapment as a
5 matter of law, it is getting tougher all
6 the time, Judge.

7 THE COURT:

8 I have indicated -- I don't know if
9 I indicated to you and Mr. Wilson --
10 I have indicated to a couple others who
11 have taken pleas that they don't hurt
12 themselves, as far as the sentence is
13 concerned, by taking a plea. I didn't
14 state, but I do state that they don't
15 hurt themselves by going to trial. I
16 remember in that circumstance where I
17 told them it didn't hurt them to plead
18 guilty that I did throw in a little
19 caveat on it that sometimes as the
20 whole parade of evidence goes through,
21 while the jury may still convict, still
22 many times the whole thing is shown
23 to be just a little on the side of
24 criminality or there are mitigating
25 circumstances that you can see in the
whole evidence, more than can be stated

Transcript of Proceedings, October 20, 1975.

1 on this argument by either Wilson or
2 yourself at this time really, that might
3 result in the judge being more lenient
4 after a conviction by a jury than after
5 a plea of guilty. I like to approach
6 it by saying it doesn't make any differ-
7 ence because a conviction by a plea is
8 just as firm and solid, as far as
9 sentencing is concerned, as is a con-
10 viction by a jury. But I frankly feel we
11 have to try the case. Mr. Wilson, I
12 am going to set aside your plea of guilty
13 and put it back to not guilty. I have
14 still coming up the sentence of Walker.
15 I do not have in his case what is in
16 yours. Obviously there is an inter-
17 relationship and I am going to have
18 to deal with that. But I think we
19 have got to try the case and see what
20 a jury does on it, and see what the
21 whole parade of evidence is. If you
22 are not guilty, you ought to be so
23 found, not convicted, and if you
24 thereafter are convicted and found
25 guilty, of course, we are right back

Transcript of Proceedings, October 20, 1975.

1 in the same posture as we are today.
2 I think we've got to do that, for if
3 what you say is true, it is the only
4 fair thing to do. I don't want to be
5 sentencing a man where there is a
6 question in my mind, which there is
7 now, maybe you are not guilty of what
8 you are charged with. This means the
9 thing is ongoing, I know, and this is
10 bad from your point of view, and further
11 work on your attorney's part, but that is
12 the way the ball game goes. So I will
13 on your behalf withdraw your plea of
14 guilty and reinstate the plea of not
15 guilty. I think we set sentencing for
16 Walker on the 3rd?

17 MR. BURNS: Yes, your Honor.

18 THE COURT: In the interim I will have to see
19 what I think of the whole package. Now,
20 in the interim, what is the bail
21 situation?

22 MR. BURNS: He was released on a \$5000 surety
23 bond.

24 THE COURT: That will continue.

25 MR. DANIELS: For the record, his wife signed

Transcript of Proceedings, October 20, 1975.

1 it.

2 MR. BURNS: A signature bond.

3 MR. DANIELS: I never had to chase him, Judge.

4 THE COURT: I have that impression. All right,
5 we will deal with it in due course.

6 MR. BURNS: Since the plea of guilty hasn't been
7 accepted by the Court, the Government
8 now withdraws any representations it
9 made to the defendant in terms of sentenc-
10 ing recommendations, since they were
11 based solely upon his entering a plea.

12 THE COURT: That would follow.

13
14
15 * * * * *

16
17 I hereby certify that this record is a
18 true and accurate transcript from my
19 stenographic notes in this proceeding.

20
21 *Harry J. Noel*
22 Official Reporter
23 U. S. District Court
24
25

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3
4 UNITED STATES OF AMERICA

5 -vs-

6 JOHN WILSON, JR.,

7 Defendant.

8
9 Proceedings in the above entitled action held before
10 the HON. JOHN T. ELFVIN, United States District Judge,
11 in and for the Western District of New York, at Buffalo,
12 New York, on November 24, 1975.

13
14 APPEARANCES:

15 RICHARD J. ARCARA, ESQ.,
16 United States Attorney, by
17 THEODORE J. BURNS, ESQ.,
18 Ass't. United States Attorney,
19 Appearing on behalf of the Government.

20
21 JOEL L. DANIELS, ESQ.,
22 Appearing on behalf of the Defendant.

23
24 * * * * *



Transcript of Proceedings, November 24, 1975.

1 MR. DANIELS: Your Honor, before the proceedings
2 commence, I would have one small request.
3 Should the Court be satisfied to accept
4 Mr. Wilson's plea and be prepared to sentence
5 Mr. Wilson, I would respectfully ask that
6 the sentence be delayed a day or two so
7 that Mr. Wilson can make the necessary
8 arrangements with his family.

9 THE COURT: All right. Now, this has been before
10 me earlier, part of a trial and a plea of
11 guilty, and a setting aside of the plea of
12 guilty, and I understand it is again here
13 for the purpose of a possible change of
14 plea, is that correct?

15 MR. DANIELS: That is correct, your Honor.

16 THE COURT: Now, Mr. Wilson, Mr. Daniels continues
17 to be your attorney, does he?

18 DEFENDANT: Yes, sir.

19 THE COURT: Now, you know from when you were before
20 me earlier that if you are pleading not
21 guilty, which you currently are, you put
22 the Government to its proof. The Govern-
23 ment would have to put witnesses on the
24 stand who would have to convince a jury --
25 and in the selection of which your attorney

Transcript of Proceedings, November 24, 1975.

1 would participate -- would have to convince
2 that jury beyond a reasonable doubt as to
3 each element of the crime before you could
4 be found guilty, before you could be con-
5 victed, you understand that?

6 DEFENDANT: Yes, sir.

7 THE COURT: And these witnesses in taking the stand
8 would have to be here in the courtroom where
9 you could look at them and they could look
10 at you, and you would be able to confront
11 them. You understand that if you plead
12 guilty you are foregoing that right?

13 DEFENDANT: Yes, I understand.

14 THE COURT: Your attorney would be able to cross
15 examine these witnesses and would be able
16 perhaps to break down their testimony so
17 that the whole truth of the matter would
18 be put before the jury and, again, you would
19 be foregoing that right.

20 DEFENDANT: Yes, sir, I understand that.

21 THE COURT: Now, when you were before me earlier,
22 and I accepted your plea of guilty, you
23 were on the witness stand and you were under
24 oath, and you testified about certain things
25 that happened on this day in April of 1975.

Transcript of Proceedings, November 24, 1975.

1 and thereafter you stood before me for
2 sentencing and you had another story that
3 you gave to me concerning those happenings.
4 Now, in view of that I would want to have
5 you take the stand again, and again be put
6 under oath, and again tell me exactly what
7 did happen on that day and these events.
8 You understand that nothing that you say
9 while under oath can be used against you
10 in any connection on these charges, but if
11 you do testify falsely on some material
12 matter that you could be charged with per-
13 jury, do you understand that?

14 **DEFENDANT:** Yes, sir.

15 **THE COURT:** All right. Swear the witness.

16 **MR. DANIELS:** May I have one moment, thirty seconds,
17 your Honor?

18 **THE COURT:** All right.

19
20 **J O H N H. W I L S O N , J R. ,** called as a witness
21 and being first duly sworn, testified as follows:

22 **EXAMINATION BY THE COURT:**

23 **Q.** Mr. Wilson, you know that you are charged with
24 having, on or about April 10, 1975, in this area,
25 in the Western District of New York, knowingly,

Transcript of Proceedings, November 24, 1975.

1 intentionally and unlawfully distributed approximately
2 five and a half grams of a substance containing
3 heroin in violation of the federal law, do you
4 understand those charges?

5 A. Yes, sir.

6 Q. Now, you had a trial, which went to a mistrial, and
7 at a certain point -- I know that you and Mr. Walker
8 sat here, you heard a lot of the testimony that was
9 given -- and there was involved on that day a
10 meeting of yourself and Mr. Walker with a Mr.
11 MacFarland and a Mr. Tolliver at a pool hall on
12 Ridge Road in Lackawanna --

13 A. No, sir, it was Mr. Kilpatrick.

14 Q. You are right. And tell me in your own words what
15 happened on that day from the time you came into the
16 pool hall.

17 A. I came into the pool hall around four o'clock in
18 the afternoon -- a little later, four-thirty -- and
19 I was shooting pool, and Toliver approached me and
20 asked me did I know anybody that could get anything
21 for him. I told him no, I didn't know anyone, and
22 he said, "Well, you do know -- do you know Elliott's
23 phone number, I believe he have something." I said,
24 "I don't know his number." He gave me the number --
25 Elliott's -- I called Elliott and asked him did he

Transcript of Proceedings, November 24, 1975.

1 have something. He said yes, he did, "how much did
2 you want?" And I told him who it was for, and he
3 said well, it would be on the corner of Ingham and
4 Holbrook, and I came back from the phone and I told
5 this to Neil, and Neil wanted to give me the money.

6 refused to take the money from Neil, and I --
7 Walker was walking by the pool room and I called him in
8 and I told him to get the money from Neil. Neil
9 told Kilpatrick to give Walker the money. Kilpatrick
10 gave Walker the money. There was \$100 short, and
11 he went back in the bathroom and got that straight,
12 and we proceeded to go to where the package was
13 supposed to be at. Walker and me was in my father's
14 car, a '69 Oldsmobile, blue and black, and Kilpatrick
15 and Neil was in a car -- I don't know -- I don't
16 remember seeing it.

17 Q. Now, who is this fellow Elliott, is this someone
18 you knew?

19 A. Yes, I knew who he was, we went to school together,
20 kindergarten.

21 Q. You told Tolliver first that you didn't know of any
22 place where you could get anything?

23 A. I wasn't aware of the fact that Elliott had it.

24 Q. What were you talking about? What were you going to
25 deal in, what was being purchased?

Transcript of Proceedings, November 24, 1975.

1 A. Two -- they call them on the street two bundles of
2 heroin.

3 Q. All right. Now, had you had to do with Elliott
4 before in the heroin -- in buying heroin -- had you
5 had to do with him before?

6 A. No, I never had any dealings with Elliott before.

7 Q. Did you know that he would from time to time be
8 dealing in heroin?

9 A. I knew that he was a drug addict.

10 Q. Had you ever purchased anything from him before?

11 A. No, I hadn't.

12 Q. You are telling me that when Tolliver asked you if
13 you knew where anything could be purchased, you said
14 no?

15 A. Correct.

16 Q. And you are telling me that it was Tolliver who then
17 suggested that Elliott might have some?

18 A. Yes, sir.

19 Q. You, yourself, had never purchased anything from
20 Elliott before?

21 A. Well, no, I haven't. He suggested Elliott and two
22 or three other people. Elliott and Walthal and a
23 fellow named Jeremny.

24 Q. Elliott was the only one you called?

25 A. Right. He had been trying to call everybody else

Transcript of Proceedings, November 24, 1975.

1 his-self.

2 Q. You are telling me it was Tolliver who gave you the
3 telephone number of Elliott?

4 A. Yes.

5 Q. Did you not have that number yourself?

6 A. No, I don't, I didn't know it.

7 Q. Would you have known where and how to contact Elliott?

8 A. I knew where he lived, yes.

9 Q. You would have to go to see him?

10 A. I would have to go to see him.

11 Q. Now, you say that you talked with Elliott, you
12 arranged where the stuff was to be left?

13 A. What happened there was that Neil wanted to go down
14 to his girl friend's house. She stayed on Holbrook
15 across the street from the bar. Upon him telling
16 me that, I told Elliott that, and Elliott said that
17 it would be somewhere near that corner by that bar,
18 somewhere around there, on the corner, near the
19 corner.

20 Q. Do you know where it finally was delivered?

21 A. Yes, I know.

22 Q. Where?

23 A. It was delivered on the right hand side of Kilpatrick's
24 car tire. I found that out through hearing it in the
25 courtroom.

Transcript of Proceedings, November 24, 1975.

1 Q. Here in the courtroom?

2 A. Yes.

3 Q. How did it get there?

4 A. I couldn't testify under oath. I can make an assumption.
5 tion. I would assume Elliott put it there or -- I
6 can't really testify who put it there, I don't know.
7 I mean I called Elliott, and he said it would be --
8 Neil wanted to go in that direction. I really can't
9 testify under oath how it got there, your Honor. I
10 didn't put it there.

11 Q. Now, you know that the testimony in court was that
12 you and Walker came to the front of the pizza place
13 and honked your horn?

14 A. Yes.

15 Q. And how did you know that the heroin was already
16 placed?

17 A. I didn't. I was going on the time scale, ten minutes,
18 usually enough time for -- Elliott live right down
19 the street, he would have had time to come and do
20 it in about ten minutes.

21 Q. Your testimony in court was also that it was under
22 the right front tire?

23 A. Right.

24 Q. You have no idea how it got there?

25 A. No, I don't, not under oath. I would assume that --

Transcript of Proceedings, November 24, 1975.

1 Elliott said it would be near that corner. He was
2 responsible for getting it there.

3 Q. What happened to the \$400?

4 A. I gave the \$400 to --

5 Q. Walker had it in the pool hall?

6 A. Yes. Walker gave the \$400 to me, I gave him \$25.

7 Q. You gave Walker \$25?

8 A. Right. I kept \$25 and I gave Carl Elliott the rest
9 of the money.

10 Q. When and where did you give that to Carl? Carl is
11 his first name?

12 A. Yes, Carl Elliott.

13 Q. When and where did you give it to Carl Elliott?

14 A. I drove right down the street. Carl was -- I
15 dropped -- Carl was supposed to go back up to the
16 pool room. I dropped Johnny off on the corner of
17 I believe -- at home, he lives on the corner of
18 Holbrook and Willmuth, and I proceeded to go straight
19 down Holbrook, and Carl was walking down that way.
20 I gave him \$350.

21 Q. Now, have you ever been a user of narcotics, of
22 heroin?

23 A. No, sir, your Honor.

24 Q. Have you prior to this time done any selling of it?

25 A. Yes.

Transcript of Proceedings, November 24, 1975.

1 Q. How often?

2 A. Any time I can catch, say for instance, a situation
3 like this, make a few dollars on it.

4 Q. It would be a number of times?

5 A. People don't trust people too much. Maybe three,
6 four times within the last -- January -- but not
7 like where I would make \$25, usually I would make
8 five.

9 Q. Do I gather that you were willing to do it if you
10 had the opportunity?

11 A. I wasn't willing to touch it ever or take the money
12 from anybody. I was willing to try to make a few
13 dollars for myself.

14 Q. You would be willing to be involved in it to the
15 extent that you were here?

16 A. Before now, your Honor, yes.

17 Q. And you say you never had made any purchase from
18 Carl Elliott before, but you knew him to be a user?

19 A. Yes. He is on the methadone program.

20 Q. Have you known him to sell before?

21 A. I can't say.

22 Q. Never sold to you?

23 A. No.

24 THE COURT: All right. I am satisfied. You may
25 step down. Inasmuch as I am satisfied

Transcript of Proceedings, November 24, 1975.

12

1 from a factual basis that I can accept a
2 plea of guilty from you, if that be your
3 intention, what is your intention as to
4 your plea? You are presently pleading not
5 guilty, do you wish to change that plea?

6 DEFENDANT: Yes.

7 THE COURT: What is your plea?

8 DEFENDANT: Guilty.

9 THE COURT: All right. Now, of course, I already
10 have a presentence report and you, Mr. Daniels,
11 have had an opportunity to examine that in
12 the past. We should move ahead promptly to
13 sentencing. You have indicated earlier that
14 Mr. Wilson would want a couple of days
15 within which to arrange his affairs, and I
16 am willing to accomodate him in that regard.
17 We should take care of it this week. This
18 is the week in which Thursday is a holiday.
19 I will accomodate you on any other day this
20 week.

21 MR. DANIELS: Wednesday, your Honor.

22 THE COURT: Wednesday would be fine.

23 MR. BURNS: Fine.

24 MR. DANIELS: Would your Honor want that in the
25 morning or afternoon?

Transcript of Proceedings, November 24, 1975.

1 THE COURT: It doesn't matter to me, if you tell
2 me what time. Are you going to be engaged
3 in trial?

4 MR. DANIELS: No, sir, there is no problem as far
5 as I am concerned. In the morning, your
6 Honor? You always like to do business in
7 the morning.

8 THE COURT: Nine o'clock Wednesday morning.

9 MR. BURNS: Thank you.

10 MR. DANIELS: Thank you, your Honor.

11
12
13 * * * * *

14
15 I hereby certify that this record is
16 true and accurate transcript from the
17 stenographic notes of this proceeding.

18 *Harry J. Lael*
19 Official Reporter
20 U.S. District Court
21
22
23
24
25

Transcript of Proceedings, November 26, 1975.

1

Buffalo, N.Y. ELFIN, J. November 26, 1975

Cr. 75-177 JOHN WILSON, JR.

APPEARANCES:

RICHARD J. ARCARA, ESQ.,
United States Attorney, by
THEODORE J. BURNS, ESQ.,
Ass't. United States Attorney,
Appearing on behalf of the Government.

JOEL L. DANIELS, ESQ.,
Appearing on behalf of the Defendant.

FILED

NOV 28 1975

AT.....O.C.....M.
JOHN K. ADAMS, Clerk

THE COURT: Mr. Burns?

MR. BURNS: Good morning, your Honor. For sentence
in United States versus John Wilson, Jr.,
Criminal 75-177.

THE COURT: Mr. Daniels, Mr. Wilson.

MR. DANIELS: Good morning, sir.

DEFENDANT: Good morning, your Honor.

THE COURT: We are here for sentencing pursuant
to your plea of guilty, Mr. Wilson. At this
time I will listen to anything that counsel
has to say on your behalf, and then I will
listen to anything you have to say.

MR. DANIELS: Thank you, your Honor. You have a
full probation report, which I have had the
opportunity to read the last time that time
was up for sentence, and I had an opportunity
to speak on behalf of my client the last time
he was here for sentencing. I would sure the

Transcript of Proceedings, November 26, 1975.

probation report reflects that Mr. Wilson has no prior convictions for offenses similar to the one to which he pled. He is a man who has above average intelligence. He is a college graduate. He is a man who perhaps in a somewhat different environment might have been able to make something more substantial of himself. He has a very nice family. His wife, I have met her several times, she is a lovely girl. He has two children. His wife has been employed as a teller with the Marine Trust Company for the past three years. As far as this incident was concerned, this is the same type of crime that has been repeated many, many times as a result of federal government and state government use of informants. This was an entrapped type of situation. I don't think that Mr. Wilson is a big dealer in narcotics. I remind the Court of the statement made by the United States Attorney at the time of the plea with regard to sentencing. I leave the entire matter to the discretion of your Honor.

THE COURT: Mr. Wilson?

DEFENDANT: I have nothing to say, Your Honor.

THE COURT:

All right. I certainly am aware of this defendant's background and his educational capabilities, and I frankly wish, Mr. Wilson, that I could see my way clear to trust that you could remain out among our citizens and walk the straight and narrow path. I don't find that I have that confidence. You are intelligent, you have an IQ of 110, which is good, you finished your college education. You are really in a situation that if you were at all inclined to do anything other than rely on your wife and rely on welfare and rely on what you can pick up in this type of dealing, the world is there. Certain people who come out of your background and without your education find themselves blocked, but everytime a black man or a black woman has the education and the intelligence, there is nothing that stops you from doing many things. In spite of that you have shown an inclination to go a way other than that. I don't know what will happen as a result of the sentence I am going to give you. I hope that through the whole thing it will work out to your benefit. As I say, I could trust you really to be out and

Transcript of Proceedings, November 26, 1975.

1
2 rely on your not getting into further trouble
3 but I find I can't. As a consequence, I am
4 going to sentence you to the custody of the
5 Attorney General of the United States for a
6 period of five years, and the law mandates
7 that I impose upon you a further probation
8 of at least three years, and I am going to
9 try to be helpful to you, frankly, in making
10 that longer than that three years, I am going
11 to make the probationary period six years.
12 This will mean you will have an imprisonment
13 term, or whatever you do serve of it, of five
14 years incarceration, then you will get out,
15 and you will have this six year probationary
16 period. If anything happens to you during
17 that period, you would be liable to go back
18 and serve that six years. It is that that
19 I hope will straighten you out. As I say,
20 maybe the incarceration will give you cause
21 and time for reflection, maybe even for
22 some further study and further work. Maybe
23 you can be helpful to other people there who
24 you are there. You do have the intelligence
25 you do have the training, and I hope that you
26 will put it to work.

I hereby certify that this is
true and accurate transcript of
stenographic notes in this case.

27 MR. BURNS:

Thank you, your Honor.

* * * * *

H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

Official Report
U. S. District Court

Judgment and Commitment Order.

United States of America vs.

JOHN WILSON, JR.

United States District Court for
WESTERN DISTRICT OF NEW YORK

DEFENDANT

FILED

DOCKET NO.

CR-75-177

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
November 28 1975

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Joel Daniels

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTYFINDING &
JUDGMENTThere being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.Defendant has been convicted as charged of the offense(s) of **did knowingly, intentionally and unlawfully distribute a substance containing heroin, a Schedule I Controlled Substance, in violation of Title 21, U.S.C., Section 841(a)(1)**SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby

sentenced to the custody of the Attorney General for a period of Five (5) Years, and Six (6) Years Special Parole Term upon completion of sentence.SPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATIONCOMMITMENT
RECOMMEN-
DATION

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

JOHN T. ELFVIN, U.S. District Judge

Date November 28, 1975

CERTIFIED AS A TRUE COPY ON

THIS DATE Dec 1, 1975

by *Alfred Thompson*

() CLERK

(X) DEPUTY

RECEIVED U.S. MARSHAL
DEC 2 10 57 AM '75
W.D.N.Y. BUFFALO, N.Y.

67
Letter, Dated December 19, 1975.

RECEIVED

DEC 23 1975

FILED

FEB 12 1976

AT O.C. M.
J STATES DISTRICT JUDGE JOHN K. ADAMS, Clerk

Jr 4th H. Wilson Jr.

10 DELAWARE AVE

c/o ERIE County Holding

Buffalo, New York

December 19, 1975

DEAR SIR:

The writer is currently incarcerated at Erie County Holding Center, pending transfer to Federal institution. All the criminal charges pertaining to my cases has been disposed of in the courts. This also includes a State sentence for which I received a one year prison term, to run concurrent with my Federal sentence.

My interest now are concerned with the Federal sentence from a twofold perspective: (1) The write is somewhat perplexed as to what ligature the six (6) years probational period has on the length of his incarceration. It is my understanding that the probational period decreases the length of incarceration, while increasing the Federal jurisdiction duration, please clarify. (2) If this is not the present situation, I would like to request of this United States Court, that my present sentence be placed under USC 4208 an A 2 sentence. It is also my understanding in relation to the above, that I would be considered for an earlier parole board hearing.

Modification of
sentence
denied.
John T. Giff
2/11/76

Letter, Dated December 19, 1975.

This letter is intended to be a humble personal request to the United States Court. If the goals pertained herein are attainable but policy mandates legal procedure to personal request, the writer would be obliged to make the proper presentations.

Please notify me as to your intentions.

Respectively Yours,
John H. Wilson Jr.

Motion to Obtain Transcripts.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES

-vs-

JOHN H. WILSON, JR.

:
:
:
:
:

CR-75-177

MOTION TO OBTAIN TRANSCRIPTS
WITHOUT PREPAYMENT OF FEES

Defendant respectfully moves this Court for permission to obtain transcripts of some of the proceedings in the above matter without payment of fee, and in support of this motion, alleges as follows:

1. Defendant is incarcerated in the Federal Correctional Institution, Danbury, Connecticut.
2. Defendant was sentenced to a term of five years, plus six years special parole, by Judge Elfvin of the District Court for the Western District of New York following his conviction for distribution of a controlled substance in violation of 21 U.S.C. §841.
3. Yale law students, working without fee, are helping Defendant to prepare a Motion to Vacate Conviction pursuant to 28 U.S.C. §2255 on the grounds that although he was told the maximum term of incarceration to which he could be sentenced, he was not informed that if he was sentenced to any term of incarceration, a mandatory special parole term would be a consequence of his plea of guilty.
4. In order to prepare the above-mentioned motion, the defendant requires the transcripts of the October 26, 1975 proceeding, in which he entered a guilty plea--which plea was refused by Judge Elfvin--the

Affidavit of John H. Wilson, Jr., dated July 23, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES

-vs-

JOHN H. WILSON, JR.

:
:
:
:
:

CR-75-177

A F F I D A V I T

State of Connecticut)

ss.: Danbury, July , 1976.

County of Fairfield)

JOHN H. WILSON, JR., being duly sworn, hereby deposes and says:

1. I am the defendant in the above-entitled proceeding;
2. I make this Affidavit in support of the attached Motion to Obtain Transcripts Without Prepayment of Fees;
3. I am currently detained at the Federal Correctional Institution at Danbury, Connecticut;
4. I have no income other than my institutional work wages of \$42.00 per month from the Federal Correctional Institution, Danbury, Connecticut;
5. I have no funds or savings other than \$6.15 in my commissary account at the Federal Correctional Institution;
6. I believe that I am entitled to the redress I plan to seek by way of Motion to Vacate Conviction;
7. My attorneys are serving without fee in this matter.

John H. Wilson Jr.
JOHN H. WILSON, JR.

Sworn and subscribed to before me

this 23 th day of July, 1976.

John H. Gargale
ADMINISTRATOR BY THE U.S. DEPT. OF JUSTICE
TO ADMINISTER CHIEF OF U.S. DEPT. OF JUSTICE

Notice of Hearing, Dated May 20, 1977.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN H. WILSON, JR.,

Petitioner,

-vs.-

THE UNITED STATES OF AMERICA,

Respondent.

Civ. 77-148

NOTICE

OF

HEARING

You are hereby notified that the attached petition of the abovenamed petitioner will be before me in Part II of this Court at 2:00 o'clock in the afternoon of Tuesday, May 31, 1977 for a hearing thereon pursuant to 28 U.S.C. §2255.

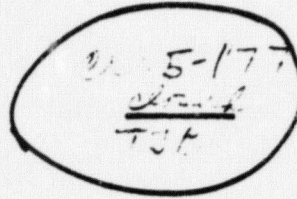
Dated: Buffalo, N.Y.
May 20, 1977

5/ JOHN T. ELLIN
U.S.D.J.

TO: Hon. Richard J. Arcara,
United States Attorney for the
Western District of New York
United States Courthouse
Buffalo, N.Y. 14202



*Sept 23, '75
Oct 20 & 24, '75*



Motion to Vacate, Set Aside, or Correct Sentence.

FJF 8200.3

FORM FOR MOTIONS UNDER 28 U.S.C. 8225

CIV - 77 - 148

MR. JOHN H. WILSON JR.
Name

#26280-145
Prison Number

ALLENWOOD FEDERAL PRISON CAMP
Place of Confinement

United States District Court WESTERN District of NEW YORK

Case No. _____ (to be supplied by Clerk of Court)

United States,

v.

JOHN H. WILSON JR.
(full name of movant) (Include name under which you were convicted)

(If movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY
A PERSON IN FEDERAL CUSTODY

INSTRUCTIONS--READ CAREFULLY

- (1) This motion must be legibly handwritten or typewritten, signed by the movant and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.
- (2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.
- (4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each judgment.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.
- (7) When the motion is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is Western District of New York
Judge's Chambers, Buffalo, New York 14202

Motion to Vacate, Set Aside, or Correct Sentence.

- (8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack US. DISTRICT COURT, WESTERN DISTRICT OF NEW YORK
2. Date of judgment of conviction November, 26, 1975
3. Length of sentence 5 yrs. and 6 yrs Sentencing Judge JOHN T. ELFVIN
special parole
4. Nature of offense or offenses for which you were convicted A schedule 1
controlled substance, in violation of title 21 U.S.C., section 841 (a)(1)

5. What was your plea? (Check one)
 (a) Not guilty ()
 (b) ~~Guilty~~ Guilty (X)
 (c) Nolo contendere ()
 If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)
 (a) Jury ()
 (b) Judge only (X)
7. Did you testify at the trial? Yes (X) No ()
8. Did you appeal from the judgment of conviction? Yes () No (X)
9. If you did appeal, answer the following:
 (a) Name of court _____
 (b) Result _____
 (c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court? Yes (X) No ()
11. If your answer to 10 was "yes," give the following information:
 (d) (1) Name of court U.S. District Court Western District of New York
 (2) Nature of proceeding Request for modification of sentence to an
 4208 A2
 (3) Grounds raised There was an informal letter. Requesting a
 clarifications of the consequences of the special parole. But
 no grounds was raised.

 (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (X)
 (5) Result Denied
 (6) Date of result 2-11-76
 (b) As to any second petition, application or motion give the same information:
 (1) Name of court U.S. District Court, Western District of New York
 (2) Nature of proceeding Rule 35 Requesting a reduction of sentence
 This second request was by letter.

Motion to Vacate, Set Aside, or Correct Sentence.

- (3) Grounds raised None
- _____
- _____
- _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (X)
- (5) Result Denied
- (6) Date of result 3-23-76
- (c) As to any third petition, application or motion, give the same information:
- (1) Name of court None
- (2) Nature of proceeding _____
- (3) Grounds raised _____
- _____
- _____
- _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (X)
- (d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?
- (1) First petition, etc. Yes () No (X)
- (2) Second petition, etc. Yes () No (X)
- (3) Third petition, etc. Yes () No ()
- (e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:
- Due to ignorance and personal understanding of legal matters of this nature.
- _____
- _____
- _____

12. State concisely every ground on which you claim that you are being held unlawfully.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

Motion to Vacate, Set Aside, or Correct Sentence.

- (e) Conviction obtained by a violation of the privilege against self-incrimination.
 - (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
 - (g) Conviction obtained by a violation of the protection against double jeopardy.
 - (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
 - (i) Denial of effective assistance of counsel.
 - (j) Denial of right of appeal.
- A. Ground One: Conviction obtained by plea of guilty entered without understanding consequence of the plea.
- Supporting FACTS (tell your story briefly without citing cases or law): At the time of sentencing the court failed to explain to the petitioner the consequence of his guilty pleas as it pertained to special parole. the sentencing minutes november 26, 1975 make no reference to such an explanation- The court on this date did not discuss the consequence of his guilty plea with regard to the special parole aspect of the sentence.

B. Ground two: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

Motion to Vacate, Set Aside, or Correct Sentence.

D. Ground four: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: MR. Joel Daniels Staler Hilton
Buffalo New York No grounds, this is my first filing of the form.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack? Yes () No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Mr. Joel Daniels Staler Hilton Buffalo,
New York

(b) At arraignment and plea Mr. Joel Daniels Statler Hilton
Buffalo, New York

(c) At trial Mr. Joel Daniels Staler Hilton Buffalo, New York

(d) At sentencing Mr. Joel Daniels Staler Buffalo, New York

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes () No (X)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes () No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes () No ()

Motion to Vacate, Set Aside, or Correct Sentence.

Wherefore, movant prays that the court grant him all relief to which he may be entitled in this proceeding.

Executed at ALLENWOOD FEDERAL PRISON CAMP, MONTGOMERY, PENNSYLVANIA
City, County, State

Wherefore JOHN H. WILSON JR. being first duly
Name of Movant

sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

John H. Wilson Jr.
Signature of Movant

Subscribed and sworn before me this 17 day of March, 1977.

[Signature]
Notary Public or other person
authorized to administer an oath

Parole Officer - Authorized by
Act of July 7, 1955 to admin-
ister oaths (18 U.S.O. 4004).

Alfred
Signature of Attorney (if any)

Motion to Vacate, Set Aside, or Correct Sentence.
IN FORMA PAUPERIS AFFIDAVIT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
[Insert appropriate court]

United States

v.

John H. Wilson Jr.
(Movant)

AFFIDAVIT IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, John H. Wilson Jr., being first duly sworn, depose and say that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ☒ No ☐
 - a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.
\$65.00 Allenwood Federal Prison Industry Montgomery penna.
 - b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?
 - a. Business, profession or form of self-employment? Yes ☐ No ☒
 - b. Rent payments, interest or dividends? Yes ☐ No ☒
 - c. Pensions, annuities or life insurance payments? Yes ☐ No ☒
 - d. Gifts or inheritances? Yes ☐ No ☒
 - e. Any other sources? Yes ☐ No ☒

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in a checking or savings account?

Yes ☒ No ☐ (Include any funds in prison accounts)

If the answer is "yes," state the total value of the items owned.
\$1.40

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ☐ No ☒

If the answer is "yes," describe the property and state its approximate value.

Motion to Vacate, Set Aside, or Correct Sentence.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

Marilyn wilson - Spouse

Dayo Wilson - Daughter

Akin Wilson - Son

I contribute fifty (50.00) a month to their support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John H. Wilson Jr.
(Movant's Signature)

State of PENNSYLVANIA.

County (City) of MONTGOMERY.

JOHN H. WILSON JR., being first duly sworn
(Name of Movant)

under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

John H. Wilson Jr.
Signature of Movant
(Required as to each movant)

Subscribed and sworn to before me this 17
day of March, 1977

[Signature]
Notary Public or other
person authorized to
administer an oath

Parole Officer - Authorized by
Act of July 7, 1955 to admin-
ister oaths (18 U.S.O. 4004).

CERTIFICATE

I hereby certify that the movant herein has the sum of \$ 140
on account to his credit at the Alamogordo
institution where he is confined. I further certify that movant
likewise has the following securities to his credit according to
the records of said Alamogordo institution:
None

[Signature]
Authorized Officer of
Institution

Parole Officer - Authorized by
Act of July 7, 1955 to admin-
ister oaths (19 U.S.O. 4004).

Motion to Vacate, Set Aside, or Correct Sentence.

RECEIVED
MAR 7 1977
CLERK, USDC WDMY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN H. WILSON JR.

Petitioner pro se, 0

vs

CRIMINAL NO. _____

UNITED STATES OF AMERICA,
Respondent

Petition for Appropriate Relief

I'm coming to you to express a present situation and to ask your co-operation and assistance in the elucidation of it.

On the 25th day of November 1975, I was sentenced by you, Honorable John T. Elfvin, Western District of New York, under a schedule 1 controlled substance, in violation of title 21 U.S.C., Section 841 (a)(1) to a term of five (5) years and six (6) years special parole term upon completion of sentence. At that time I felt foreordained toward incarceration. Besides these Federal proceedings, there were also State court charges pending, which has since been properly disposed. After considering my condition, financially, the relationship in my famil life, and my attutude in general. Perhaps incarceration has worked in a positive manner in my case. While incarcerated I've been able to reflect on my past experiences and viewing situation the way they are and not the way I would like them to be. Just recently, since I've been transferred from Danbury, Conn. To Allenwood Penna. Federal institution, the opportunity for educational betterment has presented itself. In which, I'm now currently engaged in some graduate work, what little I can afford.

Although the above experience will be helpful to the reestablishment of myself in society at large. There is an experience that is and will be the key to all future endeavors. It has really given me the strength and courage to carry on. I've have experienced a transformation of mind and heart. This has happen through none only then religious contacts with the

Motion to Vacate, Set Aside, or Correct Sentence.

prison ministry and the concern of friends I've made with people in this community. They come behind the walls and we share experience of life and the word of God. This is done within a group called "YOKEFELLOW". Yokefellow groups are designed to help an inmate with his spiritual growth. This is the realm where I truly needed help. It brings everything into its proper perspective and gives one a solid frame of reference. To reconstitute their sense of values.

At the time of sentencing you, your Honor asked if I had anything to say for myself. The reply was "No Sir Your Honor". At that time I was suffering from confused feelings of guilt, fear, and defeat in more ways than just the court case. I knew my life needed straighten and my efforts had failed, because of an ill-directed sense of values. I have witnessed numerous men both here behind the wall and in the community, men whom have gone astray in the eyes of the law of man and God's. Some even have paid their debt to society yet they have not forgiven themselves. Therefore they remain in a prison within. Only until now do I have something to say or even find myself worthy to say it. I believe that God forgives past offenses against his kingdom, and with this thought in mind, I come asking you to assist me through the power of your office to regain an entry in our society. There are situations in my life at present besides the agony of being incarcerated, which is causing great travail and heartship.

Firstly, the physical health of my mother is seriously failings. She has suffered grave illness since my incarceration. She has lost the use of one of her kidneys and the other is very weak in its functional process. Due to her anemic condition the doctors can't perform the necessary surgery or prescribe medicine. The only treatment she can have is blood transfusions. This requires hospitalization every four (4) - six (6) weeks. She has on one occasion been found unconscious on the floor because of low blood and had to be rushed to the hospital. My father works and can't be home at all times. Although I may not be able to perform any miracles

Motion to Vacate, Set Aside, or Correct Sentence.

there is a desire on my behalf to be of some assistance in comforting her during what, according to the doctors are precious moments. While home on furlough in November 1976, I spoke with Mr. McMorrow, my parole officer. He has contacted my mother's doctor, M.D. Francisisco Sanluis Jr. and Mr. McMorrow is aware of the circumstances and he's willing to assist me in whatever way he can.

Secondly, Your Honor, as it was brought out during the court proceedings that I'm married and have two children a boy five (5) years of age and a girl six (6) years of age. Since the incarceration Nov. 1975, my wife has experienced insurmountable difficulty surviving both economically and psychologically. Although, I'm working in the industry here at the institution and sends the money to her, my wife. It's of very little significants in view of the total financial situations. So she has had to get on the welfare rolls. The children have become an extreme burden to her. Being at school age yet unable to attend because their mother has to work. This incarceration has not only effected me as the petitioner but also my children during a critical period in there life. They have the stigma of being fatherless and no understanding as to why or how. Speaking sincerely, I've only been able to sustain the pressures thanks to the determination and loyalty of my wife, who somehow remains steadfast despite the tremendous financial and psychological pressures of bringing up our family.

At this time your honor, I would like to bring to your attention some of the federal system changes which has taken place since my incarceration and it's effect on my release date. Issues of which you wouldn't have taken into consideration for my sentencing. I've become aware of the very recent decision of U.S. VS Salerno et al No. 76, DC Crim No. 116-70 1213c 3rd Cir July 1976 decided by the third circuit in Phil. This held that where the inmate was sentenced prior to the adoption of parole guidelines, the judge may correct the sentence on a 28 U.S.C. 2255 motion and if there remain anything

Motion to Vacate, Set Aside, or Correct Sentence.

else necessary to perfect that motion, I would appreciate your Honor's advice and instruction in this matter.

Actually, the guidelines now printed at CFR, chapter 1 part 2 were not mandated by congress or given the force of law until May of 1976 by the newly enacted parole commission of Reorganization Act. (18 USC 4201-15) I think it is clear that the third circuit has adapted the rule of (Kortness vs U.S. 514 Fed 2nd 167 8th Circuit, 1975., that the Judge should change the sentence if it is incorrect in that the guidelines have superceded Judicial intent by super imposing on the sentence an inelastic set of time tables. This will negate the time for release which was originally anticipated by the court to the same effect are U.S.(vs) Slutsky 54 Fed. 2nd 1222, c 2nd cir. 1975. Garafola (vs) Benson, 505 Fed. 2nd 1212, 1974. U.S. (vs) Manderville 396 F Supp, 1244 and Gresso (vs) Norton 520 Fed 2nd 27, 2nd cir. 1975. This case show that statiscally almost no one seems to be paroled prior to the guidelines.

In my case, the problem has been compounded drastically because since my incarceration the guidelines have increased from 16-20 months to 20-26 months effective Dec. 1975. Then again from 20-26 months to 26-36 months, by the adoption of the new parole act May 1976.

Thus as I have remained in prison, my sentence, as a practical matter has steadily increased. Instead of facing a lessor period of incarceration as the months went by, I have been burdened with an increasing forecast of more months in prison. It has been like being on the treadmill of going backward. Surely you can understand how emotionally unbearable this has been for me and my family. Nevertheless, I have undertaken with every ounce of ability at my command, to improve and rehabilitate.

In summary, I'm hoping that you reflect upon your original intention at the time of sentencing and you now have it within your power to conform my period of confinement. I sincerely believe that I've managed to achieve a very good institutional progress and work record reports. By doing everything

Motion to Vacate, Set Aside, or Correct Sentence.

that is in my power to better myself for a life in society where I must live with others. Respectfully asking you to consider a reduction of sentence, that would bring my loved ones and myself together. Or grant me the opportunity to be of assistance to my family through a work release program somewhere in or around Buffalo, New York area. Although I've been in contact with a institution which offers this service, I as an inmate can't initiate the action which would start the ball to rolling. It is my understanding, but I'm not certain that policy statement #7550-2A or 7550-38 could be of some help. Under this policy statement with proven hardship, a community treatment center (C.T.C.), county and state institution or State halfway houses (with federal contracts) can accept Federal prisoners with up to three (3) years remaining on sentence.

All of the above is true and there's no exaggeration of the issues. I appreciated your forbearance with my pleading and thank you for your consideration in this matter. Please excuse my very poor typing and any mistakes I may have made in the legal interpretations. As I no longer have excess to a lawyer and I am trying to do the best I can to help myself and my family on my own.

Respectfully Yours,

John H. Wilson Jr.
John H. Wilson Jr.

SWORN & SUBSCRIBED BEFORE
ME THIS 2nd DAY OF MARCH 1977

[Signature]

Parole Officer - Authorized by
Act of July 7, 1955 to admin-
ister oaths (18 U.S.O. 4034).

Government Response to Petition for Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN H. WILSON, JR.,

Petitioner

-v-

UNITED STATES OF AMERICA,

Respondent

CIVIL 77-148

GOVERNMENT RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS

RICHARD J. ARCARA
United States Attorney
Western District of New York
Office and Post Office Address
502 United States Courthouse
Buffalo, New York 14202

THEODORE J. BURNS
Assistant United States Attorney
of Counsel

Government Response to Petition for Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN H. WILSON, JR.,

Petitioner

-v-

UNITED STATES OF AMERICA,

Respondent

CIVIL 77-148

GOVERNMENT RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS

PRELIMINARY STATEMENT

The petitioner was charged in a one-count indictment with possession of heroin with intent to distribute. On September 23, 1975 he pleaded guilty to the indictment.

At the time the plea was entered, the Court advised the petitioner that the maximum penalty which he could receive was fifteen years imprisonment, a fine of \$25,000, and also a mandatory special parole term of three years following any term of imprisonment which might be imposed. The Court's statement as to the maximum penalty was correct except insofar as its statement regarding the permissible length of the special parole term. Title 21, United States Code,

Government Response to Petition for Writ of Habeas Corpus.

Section 841(a)(1) provides that the special parole term must be "at least three years", without setting any maximum limit.

On November 26, 1975, the Court sentenced the petitioner to a term of imprisonment for five years with a six year special parole term thereafter. The petitioner took no appeal from the conviction or sentence.

Wilson has now filed a petition for Writ of Habeas Corpus. The Court brought this matter on for a hearing on May 31, 1977 at which time the Government orally opposed the petitioner's request for relief.

This memorandum is submitted as a statement of the Government's position with respect to the petition for Writ of Habeas Corpus and in opposition thereto.

ARGUMENT

POINT I

THE COURT SUBSTANTIALLY COMPLIED
WITH THE REQUIREMENTS OF RULE 11
OF THE FEDERAL RULES OF CRIMINAL
PROCEDURE AT THE TIME THE PETITIONER
ENTERED HIS PLEA OF GUILTY

When the petitioner entered his plea of guilty on September 23, 1975, the Court complied with the requirements

Government Response to Petition for Writ of Habeas Corpus.

of Rule 11 of the Federal Rules of Criminal Procedure by explaining in detail the consequences of the petitioner's plea and the rights which the petitioner was giving up by pleading guilty. The only matter now in dispute is the petitioner's contention that at the time he pleaded guilty he was not aware of the possibility that he could be sentenced to a mandatory special parole term to be served if the Court imposed a sentence to imprisonment.

The transcript of the Court's proceedings on September 23, 1975 contradicts the petitioner's argument:

MR. BURNS: Perhaps we might state for the record the maximum bounds. The maximum penalty that could be imposed --

THE COURT: I think I indicated fifteen years.

MR. BURNS: Fifteen years plus a fine of not to exceed \$25,000 and also a mandatory special parole term, if the Court should see fit to impose a term of imprisonment.

THE COURT: That is right. There is in this situation this tack-on of a mandatory three year probationary period, regardless of what the imprisonment might be. In other words, if I were to sentence you to three years or six years, whatever it would be, in addition to that there would be a servitude of three years of probation after the imprisonment, do you understand that?

DEFENDANT: Yes, sir, your Honor. (Pages 14-15)

Government Response to Petition for Writ of Habeas Corpus.

This record demonstrates clearly that the petitioner was advised by the Court, and the petitioner acknowledged, that he could be sentenced to a special parole term of three years in addition to a fifteen year imprisonment term.

POINT II

PETITIONER IS NOT ENTITLED
TO RELIEF ON THIS COLLATERAL ATTACK

The Second Circuit's recent decision in Del Vecchio v. United States, Docket No. 76-2165, slip op. page 3719, decided May 24, 1977 is controlling on the facts of this case. Del Vecchio had also been convicted of narcotics offenses and had been sentenced to fifteen years imprisonment with three years special parole to follow completion of the prison term. While the sentencing judge explained to Del Vecchio that he faced a maximum total of 210 years imprisonment, the judge did not advise him of the mandatory special parole term which the defendant would be required to serve after completion of his prison term. Del Vecchio did not appeal. Instead, he filed a Petition for a Writ of Habeas Corpus almost two and one half years after entry of the plea, alleging that the judge had failed to comply with Rule 11 of the Federal Rules of Criminal Procedure which

Government Response to Petition for Writ of Habeas Corpus.

required the Court to explain the "consequences of the plea" to the defendant.

The Court of Appeals held that the Court's error did not require that Del Vecchio's conviction be set aside on the collateral attack. While recognizing that the "policies behind Rule 11 are important and should be strictly enforced", the Court stated that "when a defendant takes no appeal and collaterally attacks the conviction years later, ...different considerations...come into play". Id. at 3724 and 3725. Those considerations include the principle of finality in criminal cases, and the possibility that an obviously guilty defendant may be set free because of the impossibility in trying him at a later date.

The Court held that "there must be flexibility in the collateral review of a Rule 11 claim". Id. at 3727. In determining whether to review such a claim, the Court should look to see whether there was "manifest injustice", or a "fundamental defect which inherently results in a complete miscarriage of justice", or an error "somewhat less serious than constitutional error". Id. at 3727.

Government Response to Petition for Writ of Habeas Corpus.

Stated another way, the Court said that a defendant "must at least show prejudice affecting the fairness of the proceedings or the voluntariness of the plea in order to succeed in a collateral attack based upon a Rule 11 violation". Id. at 3728.

The Second Circuit found that Del Vecchio suffered no prejudice since the sentence imposed on him--fifteen years and three years special parole--was substantially less than the total of 210 years which the Court advised him was the possible maximum sentence.

Wilson's situation is similar in some respects to the position in which Del Vecchio found himself. However, in Del Vecchio, the Court never advised the defendant at anytime of the possibility of a special parole term which had to be served at the completion of the prison term. In the instant case, the Court did advise Wilson that he would have to serve a special parole term, although the Court did misstate the possible length of the special parole term.

Nevertheless, just as Del Vecchio suffered no prejudice from the error, neither did Wilson suffer any prejudice since the combined total of the sentence actually imposed on

Government Response to Petition for Writ of Habeas Corpus.

Wilson--five years imprisonment and six years special parole--was still less than the maximum term of fifteen years imprisonment to which Wilson could have been sentenced.

Furthermore, the considerations which led the Del Vecchio Court to conclude that the petitioner's conviction in that case should not be set aside, are even more compelling in this case. As is common when drug cases are concluded, the drug evidence which was the basis for the Government's case against Wilson has now been destroyed. Therefore, it would be difficult to retry Wilson without the drug evidence.

The earlier Second Circuit case of Ferguson v. United States, 513 F.2d 1011 (2nd Cir. 1975), may be readily distinguished. In Ferguson, the sentence imposed on the defendant exceeded the maximum sentence of which the defendant had been advised. In addition, the differences between collateral and direct review of Rule 11 violations were not briefed or argued, nor discussed in the opinion of the Court.

CONCLUSION

The Court of Appeals said in Del Vecchio at 3725 that "we are aware of no case in this circuit in which a guilty plea has been vacated on collateral attack for failure to

Government Response to Petition for Writ of Habeas Corpus.

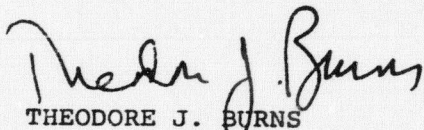
advise of a special parole term where the prison sentence, combined with the special parole term, was less than the possible maximum of which defendant had been advised".

The Government respectfully submits that this case should not become the first such case in this Circuit.

DATED: Buffalo, New York, July 7, 1977.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney
Western District of New York
Office and Post Office Address
502 United States Courthouse
Buffalo, New York 14202



THEODORE J. BURNS
Assistant United States Attorney
of Counsel

Memorandum and Order, Dated August 2, 1977.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN H. WILSON, JR.,

Petitioner,

Cr. 75-177

-vs.-

MEMORANDUM

THE UNITED STATES OF AMERICA,

and

Respondent.

ORDER

Petitioner, by papers dated March 17, 1977 and filed March 29, 1977, has applied to the Court pursuant to 28 U.S.C. §2255 to have the sentence imposed by me November 26, 1975 corrected, set aside or vacated. On September 23, 1975, subsequent to a mistrial, in The United States of America v. John Wilson, Jr., Cr. 75-177, petitioner pled guilty in this Court to the charge of violating 21 U.S.C. §841(a)(1) (distribution of heroin, a Schedule I controlled substance). On October 20, 1975, I revoked my acceptance of the petitioner's earlier guilty plea because his version of the incident as set forth in the presentence report was in conflict with the version testified to at the time he pled guilty. Such version indicated that the required intent was lacking and that a defense of entrapment was possible. On November 24, 1975, petitioner again pled guilty to the abovementioned indictment. Petitioner's version at that time affirmed the story given at the time of his prior plea of guilty. I sentenced petitioner November 26, 1975 pursuant to 21

Memorandum and Order, Dated August 2, 1977.

U.S.C. §841(b)(1)(A) to the custody of the Attorney General for a period of five years and to a special parole term of six years following such custody. Petitioner is presently incarcerated at Federal Correctional Facility at Allenwood Federal Prison Camp, Montgomery, Pennsylvania.¹

Petitioner now seeks to have his sentence vacated, set aside or corrected on the grounds that he was not informed at the time he was sentenced on November 26, 1976 of the consequences of his guilty plea as it pertained to the special parole which a court must impose in addition to a term of incarceration pursuant to 21 U.S.C. §841(b)(1)(A). In a "petition" filed March 7, 1977 petitioner contends that, due to changes in parole guidelines promulgated by the United States Board of Parole after sentence had been imposed, his period of prospective incarceration has twice been effectively lengthened beyond what I must have contemplated at the time sentence was imposed. He cites judicial authorities indicating that I may, under such circumstances and pursuant to 28 U.S.C. §2255, "correct" the sentence. Petitioner in his petition states no other grounds for relief.

I consider the March 7, 1977 and March 17, 1977 papers as a single petition.

Upon receiving this petition, I have examined into the proceedings of November 24, 1975 when the plea of guilty was

¹ Initially he had been incarcerated at Danbury, Conn.

Memorandum and Order, Dated August 2, 1977.

entered and was accepted. Without petitioner having raised any question of illegality or impropriety in such proceedings, I have myself discovered such. Accordingly, I make no ruling relative to any effect of post-sentence changes in parole guidelines. Rule 11 of the Federal Rules of Criminal Procedure requires that a defendant pleading guilty be informed of the consequences of his plea and, because it appears that he was not so informed, a review of petitioner's plea is required.

My review of the minutes of the plea proceeding indicates that petitioner was not informed on the record at that time about the imposition and nature of a special parole term. He was also not advised by me that the maximum penalty for the crime charged was 15 years in prison and a fine of \$25,000.

The minutes of the sentencing proceeding of November 26, 1975 indicate that I did impose a sentence of five years imprisonment and a special parole term of six years. I did not explain, even at that time, the nature of the special parole term, nor did petitioner or his counsel seek any explanation. Petitioner did not then object to the sentence or to the special parole term and did not move to withdraw his guilty plea because the special parole term was imposed.

In cases such as this, where the record indicates that petitioner was not informed of the applicability and nature

Memorandum and Order, Dated August 2, 1977.

of the special parole term prior to pleading guilty, some courts have ordered that the guilty plea be vacated and that the petitioner be afforded the opportunity to plead anew to the indictment. Ferguson v. United States, 513 F.2d 1011 (2d Cir. 1975).

In Ferguson, the Court of Appeals for the Second Circuit established a stringent rule for this circuit which is controlling upon me:

"[W]e hold that where the transcript or other record of the sentencing proceeding fails to disclose that the judge informed a defendant of the consequences of his plea, the defendant must be permitted to replead." Id., at 1013.

This rule's applicability to Title 21's special parole term was first indicated in Michel v. United States, 507 F.2d 461 (2d Cir. 1974)

"[T]he defendant not only should be advised that [a special parole term] will be imposed, but also should be asked by the court if he understands that fact." Id., at 463.

I must find that the petitioner was not fully aware of the consequences of his plea of guilty. Petitioner had earlier been only informed that a mandatory special parole of three years was possible if the sentence included a period of incarceration. While that is true as to that portion of the special parole term which was mandatory, the sentencing discretion available under 21 U.S.C. §841(b)(1)(A) permits a term of special parole greater than three years. See, United States v. Rich, 513 F.2d 980, 987 (2d Cir. 1975)

Memorandum and Order, Dated August 2, 1977.

(maximum term of parole of life possible). In exercising that discretion in sentencing, I sentenced petitioner to a term of special parole of six years.

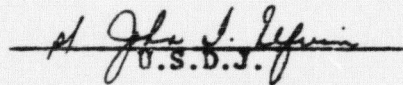
I find by review of the transcripts of the plea and proceedings that, under the rule in Ferguson, supra, the sentencing of petitioner John H. Wilson Jr. was improper.

It is therefore hereby

ORDERED that the sentence of John H. Wilson in Cr. 75-177 is hereby set aside and vacated; and it is further

ORDERED that, within 30 days of the filing of this order, petitioner John H. Wilson be brought before me to permit him to re-plead to the indictment in Cr. 75-177.

Dated: Buffalo, N.Y.
August 2, 1977


U.S.D.J.

Letter, Dated October 4, 1977, to the
Honorable John T. Elfvin.

Theodore J. Burns

October 4, 1977

TJB:bk
CR 75-177

Honorable John T. Elfvin
United States District Judge
609 United States Courthouse
Buffalo, New York 14202

Re: United States v. John H. Wilson, Jr.

Dear Judge Elfvin:

In preparing the Record on Appeal in this case, I discovered that some papers may be missing from the Clerk's file. Since the missing papers may have a substantial effect on the appeal in this case, I thought this matter should be brought to your attention before the Record must be forwarded to the Court of Appeals on October 12, 1977.

It is clear from the Clerk's file that the defendant made application for a reduction of his sentence in a letter written to the Court and dated December 19, 1975. This letter was filed with the Clerk on February 12, 1976, with the Court's endorsement on the letter, denying defendant's application. The defendant correctly states in paragraph 11(a) of his Motion to Vacate, Set Aside or Correct Sentence that such a motion was made and denied.

However, in paragraph 11(b) of his Motion, the defendant claims that he made a second post-trial motion which he describes as a "Rule 35 requesting a reduction of sentence. This second request was by letter". He further states that this second motion was denied on March 23, 1976. In reviewing the Clerk's file and the Docket Sheet for this case, I could find no such second motion, nor could I find any reference to any such motion in any of the other records or papers relating to this case which had been filed with the Clerk.

Letter, Dated October 4, 1977, to the
Honorable John T. Elfvin.

Also, the records indicate that the defendant filed a Motion to Obtain Transcripts Without Prepayment of Fees on August 24, 1976. The Docket Sheet indicates that the Motion was filed "with Judges endorsement granting same". However, the Motion in the Clerk's file does not contain any such endorsement. Furthermore, and even more troubling, it appears that at least one page of this Motion is missing since the document in the Clerk's file consists of only one page which ends in mid-sentence and contains no signature or other indication of the preparer of the Motion. This Motion could be particularly significant since it contains an admission by the defendant that he was in fact aware at the time of his sentencing of the maximum term of imprisonment which he could receive upon his plea of guilty to the indictment.

I bring this matter to your attention with the hope that something may be done to make the Record as complete as possible prior to October 12, 1977. Perhaps it would be advisable for the Court to meet with counsel prior to that date to discuss the matter.

Respectfully yours,

RICHARD J. ARCARA
United States Attorney

BY: THEODORE J. BURNS
Assistant U. S. Attorney

cc: Joel Daniels, Esq.

John K. Adams
Clerk of the Court

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Letter, Dated October 4, 1977, to Assistant
U. S. Attorney Theodore J. Burns.

United States District Court

Western District of New York

Buffalo, N. Y. 14202

Chambers of
Judge John T. Elfvig



October 4, 1977

Theodore J. Burns, Esq.
Assistant United States Attorney
502 U. S. Courthouse
Buffalo, N.Y. 14202

U.S. v. John H. Wilson, Jr.
Cr. 75-177

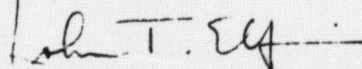
Dear Ted:

Pursuant to your letter of the 4th I have searched
and caused to be searched my own file in the above case.

I find no letter or motion of March 23, 1976 or any
close date and no record of or reference to any such.

Also, I have neither the whole nor any part of an
August 24, 1976 motion for a free transcript. Again,
there is not any reference to any such.

Very truly yours,


JOHN T. ELFVIN

^s
cc: Joel L. Daniels, Esq.
Hon. John K. Adams

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: John H. Wilson Jr.
vs
United States
No. 77-1352

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 2nd day of November, 19 77
I mailed copies of a printed Appendix in
the above case, in a sealed, postpaid wrapper, to:

10 copies to: A. Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: Joel L. Daniels, Esq.
1370 Statler Hilton
Buffalo, New York 14202

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Richard J. Arcara, United States Attorney, Att: Theodore J. Burns, Assistant
United States Attorney
502 United States Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

2nd day of November, 19 77
Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978

